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# Minnesota Price Discrimination and Sales-Below-Cost Statutes: Should They Be Repealed, Amended, or Left Alone?

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# MINNESOTA PRICE DISCRIMINATION AND SALES-BELOW-COST STATUTES: SHOULD THEY BE REPEALED, AMENDED, OR LEFT ALONE?

by LEON R. GOODRICH†

*On various occasions and apparently with little thought to consistency, the Minnesota Legislature has enacted statutes that proscribe selling commodities below cost and at different prices in different locations. In this Article, Mr. Goodrich explores the plethora of prohibitions relating to price discrimination and sales below cost to point out the similarities and distinctions among the various statutes. His focus is upon the Minnesota statutes. However, his analysis of the issues raised by the Minnesota statutes and the summary of other states' statutes in the Appendix will also assist those who must deal with similar statutes in states other than Minnesota. While not attempting to offer a resolution to the question posed by the title, Mr. Goodrich has presented a perspective from which the reader may begin to form an answer.*

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## I. INTRODUCTION

Since before the turn of the century, legislative bodies in the United States have enacted statutes for the purpose of preserving competition among businesses.<sup>1</sup> One type of legislation, whether

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1. The initial landmark legislation was the Sherman Antitrust Act, enacted by Congress in 1890. Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1-7 (1976)). Legislation opposed to unbridled competition dates from before the

or not consistent with the underlying purpose of the basic legislation, has been prohibitions of price discrimination<sup>2</sup> and sales below cost.<sup>3</sup> At the federal level, Congress purported to deal

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Revolutionary War. See McAllister, *Price Control by Law in the United States: A Survey*, 4 LAW & CONTEMP. PROB. 273 (1937).

2. As used herein, the term "price discrimination" refers to selling the same or similar products to different purchasers at different prices.

Prohibitions against price discrimination originally developed as a result of economic changes caused by the evolution of the railroad industry. See *Great W. Ry. v. Sutton*, L.R. 4 E. & I. App. 226, 237 (1869); Lake, *The Development of Legal Restraints on Discrimination in Prices*, 3 LA. L. REV. 559, 567-68 (1941). Prior to that time, the common law afforded protection from being charged unreasonable rates, but not from being charged a different rate than that charged another. See, e.g., *Great W. Ry. v. Sutton*, L.R. 4 E. & I. App. at 237; *Baxendale v. Eastern Counties Ry.*, 140 Eng. Rep. 1004, 1011 (C.P. 1858); Lake, *supra*, at 564-65. The railroad industry's attempts to eliminate independent competitors by adopting preferential rate schemes was the motivating factor in establishing price discrimination prohibitions. See *id.* at 585. The first method of assuring that railroads charge uniform rates, followed by the English House of Lords prior to 1845, was the frequent insertion of clauses prohibiting price discrimination, called Lord Shaftesbury clauses, into the special incorporating acts granting railroad charters. See *Great W. Ry. v. Sutton*, L.R. 4 E. & I. App. at 237. The Railway Clauses Consolidation Act, 1845, 8 & 9 Vict., c. 20, § 90, enacted the language of the Lord Shaftesbury clauses into law generally applicable throughout the railroad industry. See *Great W. Ry. v. Sutton*, L.R. 4 E. & I. App. at 237-38. Thus, price discrimination in the railroad industry was proscribed.

In the United States, legislation prohibiting price fixing was known in colonial times. See McAllister, *supra* note 1. The first price discrimination proscriptions, however, may be found in several state constitutions. See, e.g., MINN. CONST. of 1857, art. 10, § 4 ("[A]ll corporations being common carriers . . . shall be bound to carry the mineral, agricultural and other productions or manufactures on equal and reasonable terms."). Eventually, courts in the United States recognized a common law right to relief from the effects of unlawful price discrimination. See, e.g., *Sullivan v. Minneapolis & R.R. Ry.*, 121 Minn. 488, 495, 142 N.W. 3, 6 (1913) ("[T]he modern common law imposes upon common carriers the duty of equality in tolls to all shippers similarly situated . . ."); *Messenger v. Pennsylvania R.R.*, 36 N.J.L. 407, 412 (Sup. Ct. 1873) (English statutory law represents American common law view), *aff'd*, 37 N.J.L. 531 (Ct. Err. & App. 1874).

3. Laws prohibiting sales below cost have an origin distinct from price discrimination statutes. The early English courts were not receptive to actions resulting from damages inflicted by a competitor's sales below cost. See McCarthy, *Whatever Happened to the Small Businessman?* The California Unfair Practices Act, 2 U. S.F. L. REV. 165, 167 (1968). In *Mogul S.S. Co. v. McGregor, Gow & Co.*, 23 Q.B.D. 598 (1889), *aff'd*, [1892] A.C. 25, the court found no cause of action for damages that were caused by a sale below cost. Not until the classic Minnesota case of *Tuttle v. Buck*, 107 Minn. 145, 119 N.W. 946 (1909) did the common law afford a remedy for selling below cost. In *Tuttle*, a small town barber's business was threatened with extinction when a competing barber shop was established by a wealthy businessman who attempted to drive the plaintiff out of business by various methods, including selling below cost. Because the tort received slow recognition from the courts and the cause of action required that malicious destruction of another's business be the defendant's sole motive, it is not surprising that statutory prohibitions against selling below cost arose to meet rapidly changing economic conditions. Cf. *Katz v. Kapper*, 7 Cal. App. 2d 1, 6, 44 P.2d 1060, 1062 (1935) (demurrer to complaint alleging damages from sale below cost for sole purpose of driving plaintiff from competition sustained; unfair methods not actionable and extension of jurisdiction is legislative

definitively with price discrimination in 1936 by enacting the Robinson-Patman Act,<sup>4</sup> which precludes sellers from discriminating among purchasers both in price and by various indirect methods.<sup>5</sup> At the state level, a wide variety of statutes have been enacted to prohibit price discrimination and sales below cost.<sup>6</sup> Minnesota is among the states having enacted such statutes.<sup>7</sup>

This Article will examine the Minnesota statutes prohibiting price discrimination and sales below cost. Although many of the Minnesota statutes have been in existence for decades,<sup>8</sup> two current developments make this Article timely. Recently, the Minnesota Legislature has considered passage of additional legislation relating to price discrimination.<sup>9</sup> At the same time, federal enforcement authorities<sup>10</sup> and congressional committees<sup>11</sup> are

prerogative). In *State v. Wender*, 149 W. Va. 413, 416, 141 S.E.2d 359, 361-62 (1965), the court notes that in 1902 South Carolina was the first state to enact a statute prohibiting selling below cost, but that the current trend of statutes dates from the depression years when Congress enacted the Robinson-Patman Act, ch. 592, 49 Stat. 1526 (1936) (codified at 15 U.S.C. §§ 13-13b, 21a (1976)). See generally McCarthy, *supra*; Comment, *Sales Below Cost Prohibitions: Private Price Fixing Under State Law*, 57 YALE L.J. 391, 392-94 (1948).

4. See Robinson-Patman Act, ch. 592, 49 Stat. 1526 (1936) (codified at 15 U.S.C. §§ 13-13b, 21a (1976)).

5. See Robinson-Patman Act § 1, 15 U.S.C. § 13 (1976).

6. The state statutes currently in effect are collected in the Appendix to this Article. While the Appendix does not purport to describe in detail all the features of these statutes, it does contain references to most of the significant provisions.

7. The current Minnesota legislation of general application is found at MINN. STAT. §§ 325.02-.075 (1976). In addition to this general legislation, the Minnesota Legislature has enacted statutes that apply to various specific products. See notes 15, 171 *infra* (listing statutes).

8. The first Minnesota legislation dealing with price discrimination was enacted in 1907 and addressed price discrimination in the petroleum industry. See Act of Apr. 20, 1907, ch. 269, 1907 Minn. Laws 363. This Act, found to be constitutional in *State ex rel. Young v. Standard Oil Co.*, 111 Minn. 85, 101-02, 126 N.W. 527, 531-32 (1910), discussed in notes 273-78 *infra* and accompanying text, has endured to the present with only minor changes. Compare Act of Apr. 20, 1907, ch. 269, 1907 Minn. Laws 363 with MINN. STAT. § 325.82 (1976).

A general act prohibiting price discrimination was enacted in 1921. See Act of Apr. 20, 1921, ch. 413, 1921 Minn. Laws 640 (repealed 1937). The present version of the general act, MINN. STAT. §§ 325.02-.075 (1976), however, dates from 1937. See Act of Mar. 30, 1937, ch. 116, 1937 Minn. Laws 180 (amended 1937, 1939, 1941, 1955, 1957, and 1967).

9. See notes 454-501 *infra* and accompanying text. The two bills that have recently been considered by the Legislature are reproduced in notes 456, 490 *infra*. In 1977, the Legislature not only considered certain bills that would have amended the law on price discrimination and sales below cost but also enacted a new law relating to the sale of beer. See notes 224-26 *infra* and accompanying text.

10. See generally U.S. DEP'T OF JUSTICE, REPORT ON THE ROBINSON-PATMAN ACT (1977) [hereinafter cited as DEP'T OF JUSTICE REPORT]; notes 509-37 *infra* and accompanying text.

11. See generally AD HOC SUBCOMM. ON ANTITRUST, THE ROBINSON-PATMAN ACT, AND

reassessing the desirability and effects of the Robinson-Patman Act in light of over forty years' experience with it. It is timely, therefore, to examine the meaning and present significance of the Minnesota statutes prohibiting price discrimination and sales below cost and to consider factors pertinent to an evaluation of any proposed legislation.

The provisions of the various Minnesota price discrimination and sales-below-cost statutes will first be surveyed, followed by an examination of judicial decisions construing the statutes. An attempt then will be made to identify criteria useful to answering the question posed by the title of this Article: Should the statutes be repealed, amended, or left alone?

## II. THE PROVISIONS OF THE PRESENT MINNESOTA PRICE DISCRIMINATION AND SALES-BELOW-COST STATUTES

The Robinson-Patman Act has long been assailed as one of the worst-drafted laws extant.<sup>12</sup> Review of the hodgepodge of Minnesota price discrimination and sales-below-cost statutes, however, reveals the Robinson-Patman Act, by contrast, to be almost a model of precision and structure.<sup>13</sup>

The Minnesota statutes can be placed somewhat arbitrarily into two categories: (1) The Act Against Unfair Discrimination and Competition,<sup>14</sup> and (2) statutes applicable to particular products.<sup>15</sup> The prohibitions of each will be discussed first, followed

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RELATED MATTERS, HOUSE COMM. ON SMALL BUSINESS, RECENT EFFORTS TO AMEND OR REPEAL THE ROBINSON-PATMAN ACT, H.R. REP. NO. 94-1738, 94th Cong., 2d Sess. (1976) [hereinafter cited as SUBCOMM. REPORT]; notes 538-49 *infra* and accompanying text.

12. See, e.g., *Automatic Canteen Co. of America v. FTC*, 346 U.S. 61, 65 (1953) ("[P]recision of expression is not an outstanding characteristic of the Robinson-Patman Act."); Anonymous, *Eine Kleine Juristische Schlummergeschichte*, 79 HARV. L. REV. 921 (1966); Austern, *Presumption and Percipience About Competitive Effect Under Section 2 of the Clayton Act*, 81 HARV. L. REV. 773 (1968); Rowe, *Price Discrimination, Competition, and Confusion: Another Look at Robinson-Patman*, 60 YALE L.J. 929, 929, 940-41 (1951).

13. For example, the definitional section of chapter 325 of the Minnesota Statutes contains three definitions of the word "person." See MINN. STAT. § 325.01(12), (13), (16) (1976). Further anomalies in the statutory scheme are discussed in notes 65-115, 239-47 *infra* and accompanying text (comparing and contrasting various provisions).

14. MINN. STAT. §§ 325.02-.075 (1976). See notes 16-164 *infra* and accompanying text. Critics of price discrimination laws might choose to accept this title literally as identifying an act "against competition."

15. See, e.g., MINN. STAT. §§ 17.14-.19 (1976) (farm products); *id.* § 32A.04 (dairy products); *id.* § 151.061 (prescription drugs); *id.* §§ 325.64-.76 (cigarettes), as amended by Act of Apr. 5, 1978, ch. 793, §§ 72, 98, 1978 Minn. Laws 1179; MINN. STAT. § 325.82 (1976) (petroleum products); *id.* §§ 325B.01-.17 (Supp. 1977) (beer); *id.* § 340.114 (liquor);

by an examination of the penalties for noncompliance with them.

### A. *The Act Against Unfair Discrimination and Competition*

The Minnesota price discrimination statute of general application was enacted in 1937<sup>16</sup> and at that time was known as the Minnesota Unfair Trade Practices Act.<sup>17</sup> With some modifications,<sup>18</sup> the 1937 legislation now appears in sections 325.02 through 325.075 of Minnesota Statutes<sup>19</sup> and is entitled "The Act Against Unfair Discrimination and Competition."<sup>20</sup> Three main provisions appear in this Act: the prohibition against locality

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statutes cited in note 171 *infra* (miscellaneous other products); notes 165-247 *infra* and accompanying text.

16. See Act of Mar. 30, 1937, ch. 116, 1937 Minn. Laws 180 (current version at MINN. STAT. §§ 325.02-.075 (1976)). The 1937 statute contained three parts: Parts 2 and 3 were, respectively, addressed to sales below cost and enforcement of the act. Part 1, as observed by the court in *Great Atl. & Pac. Tea Co. v. Ervin*, 23 F. Supp. 70, 83 (D. Minn. 1938) (*per curiam*), was in effect a reenactment of a 1921 law, Act of Apr. 20, 1921, ch. 413, 1921 Minn. Laws 640 (repealed 1937), which prohibited sellers from discriminating in prices between different localities. The scope of the 1921 law was more limited than the 1937 law in that the 1921 law prohibited discriminatory prices only if the seller's purpose was to injure a competitor. The 1937 law was broader and this broader application of the price discrimination and sales-below-cost statutes continues to the present.

17. See *Great Atl. & Pac. Tea Co. v. Ervin*, 23 F. Supp. 70, 72 (D. Minn. 1938) (*per curiam*) (referring to the 1937 legislation by this name).

18. The first amendment to the statute occurred the same year it was originally passed. The inadvertent omission of the word "not" in one provision was corrected by Act of Apr. 26, 1937, ch. 456, 1937 Minn. Laws 709. Following the decision in *Great Atl. & Pac. Tea Co. v. Ervin*, 23 F. Supp. 70 (D. Minn. 1938) (*per curiam*), which held certain portions of the Act unconstitutional, the Legislature amended the statute in an attempt to remedy the constitutional defects. See Act of Apr. 22, 1939, ch. 403, 1939 Minn. Laws 794. These amendments were upheld by the Minnesota Supreme Court in *McElhone v. Geror*, 207 Minn. 580, 292 N.W. 414 (1940).

In 1941, the Legislature added the word "legal" to the meeting-competition defense, permitted customary cash discounts to be considered in the cost computation, and made other technical amendments. See Act of Apr. 21, 1941, ch. 326, §§ 1-4, 1941 Minn. Laws 617. The 1955 Legislature, reversing the determination of the 1941 Legislature, required the cost computation to be made without a deduction for customary cash discounts, although a deduction for trade discounts in some instances was added. See Act of Apr. 5, 1955, ch. 339, § 1, 1955 Minn. Laws 498. Definitions also were added to the law and the *prima facie* violations rewritten by the 1955 Legislature. See *id.* §§ 2-5. Two years later, the Legislature changed the section 325.03 requirement of anticompetitive purpose and effect to purpose or effect and created the 8%-retail, 2%-wholesale cost-of-doing-business presumptions. See Act of Apr. 27, 1957, ch. 822, §§ 1, 3, 1957 Minn. Laws 1161.

19. See MINN. STAT. §§ 325.02-.075 (1976). See also *id.* § 325.01 (definitions of terms used in chapter 325).

20. This is the title adopted by the Revisor of Statutes to identify the statute. See 3 MINN. STAT. 4384 (1976). The statute also has been referred to as the "8% law" because of the presumption that retail sales at less than 8% above cost are violations of the Act. See *State v. Applebaums Food Mkts., Inc.*, 259 Minn. 209, 210, 106 N.W.2d 896, 897 (1960).

price discrimination,<sup>21</sup> the prohibition against selling below cost,<sup>22</sup> and the presumptions available in establishing *prima facie* violations.<sup>23</sup> Unless one has recently reviewed this Act as amended to date, the following description may contain some surprises.

### 1. *Locality Price Discrimination*

Strangely enough, two separate yet overlapping provisions in the Act each prohibit locality price discrimination.<sup>24</sup> These prohibitions are not merely repetitive but differ in material ways.

#### a. *Locality Price Discrimination Under Section 325.03*

The basic elements of a section 325.03 violation can be reduced to three:

- (1) the sale or furnishing of a commodity,
- (2) at a lower price in one section of Minnesota than is charged in another section of Minnesota,
- (3) for the purpose or with the effect of injuring a competitor or destroying competition.<sup>25</sup>

The first element of a violation—the sale or furnishing of a commodity—applies “only to the manufacture, production, or distribution of any *commodity, article, goods, wares, or merchandise* in general use or consumption.”<sup>26</sup> The apparent purpose of this provision is to make it clear that the prohibition does not apply to the furnishing of services.<sup>27</sup> In this regard, section 325.03 is similar to the Robinson-Patman Act, which also applies solely to sales of commodities.<sup>28</sup>

Section 325.03 applies to the “furnishing” of commodities as well as their sale.<sup>29</sup> Thus, it would apparently encompass gifts and perhaps even leases or other devices by which a commodity is

21. See MINN. STAT. § 325.03 (1976); *id.* § 325.04, para. 2; notes 24-115 *infra* and accompanying text.

22. See MINN. STAT. § 325.04, para. 1 (1976); notes 116-45 *infra* and accompanying text.

23. See MINN. STAT. § 325.075 (1976); notes 146-64 *infra* and accompanying text.

24. Compare MINN. STAT. § 325.03 (1976) with *id.* § 325.04, para. 2.

25. See *id.* § 325.03.

26. *Id.* § 325.02 (emphasis added); see *id.* § 325.03. The prohibition also applies to any “printed or mimeograph matter.” *Id.*

27. See *id.* § 325.02. Other state legislatures have included services within their statutory schemes prohibiting price discrimination and sales below cost. See Appendix § C.

28. See Robinson-Patman Act § 1(a), 15 U.S.C. § 13(a) (1976) (“It shall be unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers of commodities . . .”); notes 470-71 *infra* and accompanying text.

29. See MINN. STAT. § 325.03 (1976).



furnished by one person to another. This conclusion is supported by the fact that section 325.03 applies to discriminatory rates as well as discriminatory prices.<sup>30</sup> The use of the term "rate" seems to contemplate leases. Section 325.03, therefore, appears to differ from the Robinson-Patman Act, which has been interpreted to apply to sales but not to leases.<sup>31</sup>

The second element of a violation—discriminating in price among different sections of the state—is very broadly stated. The discrimination is unlawful if it is between different "sections, communities, or cities . . . or any portion thereof"<sup>32</sup> and includes "any scheme of special rebates, collateral contracts, or any device of any nature whereby such discrimination is, in substance or fact, effected in violation of the spirit and intent of" the Act.<sup>33</sup> This encompasses discrimination by a seller between two different purchasers and, in addition, literally includes price discrimination in two transactions involving the same purchaser if the sales are made in different sections of the state. However, discrimination among different purchasers at a *single* location, such as the seller's plant, may not be covered by this section even though the purchasers come from different sections of the state.

The third basic element for a violation is discrimination "for

30. *See id.*

31. *See, e.g.,* SCM Corp. v. Xerox Corp., 394 F. Supp. 384, 385 (D. Conn. 1975) (Robinson-Patman Act inapplicable to lease of copy machine); Gaylord Shops, Inc. v. Pittsburgh Miracle Mile Town & Country Shopping Center, Inc., 219 F. Supp. 400, 403 (W.D. Pa. 1963) (Robinson-Patman Act inapplicable to leased realty); note 470 *infra*.

32. MINN. STAT. § 325.03 (1976). Statutes in other states employ similar language. *See* Appendix § A.2. The Michigan Supreme Court, in *People v. Charles E. Austin, Inc.*, 301 Mich. 456, 3 N.W.2d 841 (1942), found the reference to "sections or communities" unconstitutionally vague. *See id.* at 459, 3 N.W.2d at 843-44. Attempts by the South Carolina Legislature to define locality price discrimination have met with a similar fate. *See State v. Texas Co.*, 136 S.C. 200, 206-07, 134 S.E. 211, 213 (1926) (court interpreted statute to prohibit discrimination only if effected between different cities within state). The South Carolina Legislature's attempt to overrule the result reached in the *Texas Co.* case was reviewed in *State v. Standard Oil Co.*, 195 S.C. 267, 10 S.E.2d 778 (1940) and found unconstitutional. *Id.* at 292, 10 S.E.2d at 789. Rather than broadening the scope of the prohibition, the amended statute applied only when discriminatory practices were effected within the confines of a single city. *See id.* at 280-81, 10 S.E.2d at 784. In this context, the court found the use of the word "sections" unconstitutionally vague. *See id.* at 282-85, 10 S.E.2d at 785-86.

33. MINN. STAT. § 325.03 (1976). The laws in other states also attempt to reach similar practices by prohibiting indirect pricing discrimination. *See* Appendix § D. The rebate systems must be discriminatory, of course, as the decision in *Baratti v. Koser Gin Co.*, 206 Ark. 813, 177 S.W.2d 750 (1944) illustrates. In *Baratti*, the court concluded that, to violate the law, a rebate system, in addition to having a tendency to destroy competition, also must be secret and unavailable to all persons on the same terms and conditions. *Id.* at 819-20, 177 S.W.2d at 753.

the purpose or with the effect of injuring a competitor or destroying competition."<sup>34</sup> Presumably, an innocent intent does not avoid violation if anticompetitive effect is present;<sup>35</sup> literally, however, an unlawful intent, regardless of effect, is also sufficient for violation.<sup>36</sup> Thus, where unlawful intent is present, there may

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34. MINN. STAT. § 325.03 (1976).

35. See *id.*; *State v. Lanesboro Produce & Hatchery Co.*, 221 Minn. 246, 256-63, 21 N.W.2d 792, 796-99 (1946) (price discrimination statute with no requirement of anticompetitive intent or effect upheld); cf. *McElhone v. Geror*, 207 Minn. 580, 585, 292 N.W. 414, 417 (1940) (sales below cost may be prohibited absent requirement of anticompetitive intent). The constitutional necessity of anticompetitive intent or effect elements in price discrimination and sales-below-cost statutes is discussed more fully in note 36 *infra*.

36. While this conclusion is apparent from the language of section 325.03, judicial construction of statutes requiring anticompetitive intent or effect has resulted in many diverse holdings. In *Hill v. Kusy*, 150 Neb. 653, 35 N.W.2d 594 (1949), the Nebraska court concluded that the words "intent" and "effect" mean "practically the same thing." *Id.* at 656-57, 35 N.W.2d at 596. Several state courts have upheld statutes that merely prohibit price discrimination and sales below cost without reference to intent or effect. See, e.g., *May's Drug Stores, Inc. v. State Tax Comm'n*, 242 Iowa 334, 45 N.W.2d 245 (1950) (sale-below-cost statute within proper police power of legislature); *State v. Lanesboro Produce & Hatchery Co.*, 221 Minn. 246, 256-63, 21 N.W.2d 792, 796-99 (1946) (price discrimination statute upheld against due process attack). Other courts, however, have held that intent is unnecessary if an anticompetitive effect is present. See, e.g., *McElhone v. Geror*, 207 Minn. 580, 585, 292 N.W. 414, 417 (1940) ("Sales below cost which have the effect of injuring competition may be prohibited regardless of intent."). Some state courts maintain an absolute intent requirement. See, e.g., *San Ann Tobacco Co. v. Hamm*, 283 Ala. 397, 402, 217 So. 2d 803, 806-07 (1968) (amendment adding words "or with the effect thereof" removed intent element rendering statute invalid).

One commentator has called intent requirements a "legislative draftsman's nightmare," stating that such a requirement in trade legislation "is pure gobbledygook" because "intent to increase the seller's own business is inseparable from the intent to cause a loss to competitors." McCarthy, *supra* note 3, at 190-91 (footnote omitted).

The controversy surrounding constitutional requirements of intent or effect elements in price discrimination and sales-below-cost statutes originated with the United States Supreme Court case of *Nebbia v. New York*, 291 U.S. 502 (1934), in which the Court stated, "[i]f the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied." *Id.* at 537. It has been argued that *Nebbia*, in effect, overruled the earlier case of *Fairmont Creamery v. Minnesota*, 274 U.S. 1 (1927), which had held that price discrimination cannot be prohibited irrespective of the discriminator's motive. *Id.* at 8-9; see, e.g., *State v. Lanesboro Produce & Hatchery Co.*, 221 Minn. at 258, 263, 21 N.W.2d at 798, 799 (*Fairmont Creamery* no longer states the law); McCarthy, *supra* note 3, at 188 (*Fairmont Creamery* "is merely an historical footnote of an era when freedom of contract could justify nullifying any state economic regulation in the name of the Constitution").

Although intent is not constitutionally required in a statutory crime, *United States v. Balint*, 258 U.S. 250, 252-53 (1922), and one may not plead good faith or ignorance as a defense to violation of the law, see, e.g., *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971), most states have persisted in applying the reasoning of *Fairmont Creamery* by requiring either predatory intent or effect as a prerequisite to a violation of price discrimination and sales-below-cost statutes. See, e.g., *Wholesale Tobacco Dealers Bureau of So. Cal., Inc. v. National Candy & Tobacco Co.*, 11 Cal. 2d 634,

be a violation with only threatened injury to competition.<sup>37</sup>

Two express statutory defenses to a section 325.03 violation are available. First, prices charged by a seller for commodities may differ to the extent of variations in their grade, quality, or quantity, after equalizing freight charges.<sup>38</sup> Second, a discriminatory price may be charged if it results from a good faith attempt to meet local competition within the community.<sup>39</sup> Except for the reference to quantity differences, both defenses reflect elements similar to those in the Robinson-Patman Act.<sup>40</sup>

#### *b. Locality Price Discrimination Under Section 325.04*

Although entitled "Selling Below Cost Forbidden," section 325.04 also prohibits locality price discrimination.<sup>41</sup> Unlike section 325.03,<sup>42</sup> however, section 325.04 applies to "the selling, offering, or advertising for sale, giving away or offering or advertising the intent to give away of any commodity, article,

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658, 82 P.2d 3, 17 (1938); *Twin City Candy & Tobacco Co. v. A. Weisman Co.*, 276 Minn. 225, 232-35, 149 N.W.2d 698, 703-04 (1967) (distinguishing *Lanesboro*; holding that anti-competitive purpose or effect required to uphold statute).

The issue of whether either intent or effect is necessary to uphold Minnesota's statutes prohibiting price discrimination and sales below cost has yet to be completely settled. In *Twin City Candy*, the Minnesota court distinguished price discrimination statutes from sales-below-cost statutes, stating that the activity in *Lanesboro* involved a "patently unfair practice" with "little room for honest mistake or inconsequential effect." *Id.* at 234, 149 N.W.2d at 704. Thus, in situations of sales-below-cost prohibitions, *Twin City Candy* and *McElhone* clearly indicate that either an intent or effect element is necessary to sustain the validity of the statute. However, the only Minnesota case since *Nebbia* that has dealt directly with intent and effect elements in a price discrimination statute is *Lanesboro*. The *Lanesboro* court upheld a statute prohibiting discrimination in buying that required neither intent nor effect. *See* 221 Minn. at 256-63, 21 N.W.2d at 796-99. Because *Twin City Candy* distinguished the evil present in price discrimination from that involved in sales below cost, it may be argued that, in Minnesota, intent or effect is not a constitutionally required element in price discrimination statutes. Thus, assuming that the court would not further distinguish statutes prohibiting discrimination in purchasing from statutes prohibiting discrimination in selling, in an alleged section 325.03 violation, the seller should not be able to use as a defense the absence of a statutory requirement of predatory intent or anticompetitive effect of the sale.

37. In addition, MINN. STAT. § 325.907(3) (1976) authorizes the Attorney General to seek an injunction against threatened violations of the Act.

38. *See id.* § 325.03.

39. *See id.*

40. Compare *id.* with Robinson-Patman Act § 1(a)-(b), 15 U.S.C. § 13(a)-(b) (1976).

41. *See* MINN. STAT. § 325.04 (1976). The first paragraph of this section proscribes sales below cost. Locality price discrimination is addressed in the second paragraph. The final paragraph reiterates that indirect pricing practices are prohibited by this section.

42. Section 325.03 applies "only to the manufacture, production, or distribution of any commodity, article, goods, wares, or merchandise in general use or consumption." *Id.* § 325.02; *see* notes 26-31 *supra* and accompanying text.

goods, wares, or merchandise, in *wholesale or retail trade*.”<sup>43</sup>

The elements of a section 325.04 violation, which in a very broad sense are comparable to those for a section 325.03 violation,<sup>44</sup> are as follows:

- (1) selling goods,
- (2) in any part of this state at prices lower than those exacted by the seller elsewhere in the state,
- (3) for goods of like quality and grade,
- (4) when the effect of such lower price may be substantially to lessen competition or tend to create a monopoly in any line of business, or to injure, destroy, or prevent competition.<sup>45</sup>

The first element indicates that, as in the case of section 325.03,<sup>46</sup> price discrimination in the sale of services is not covered.<sup>47</sup> However, while section 325.04 refers to any retailer who sells goods, the section does not include the term “furnishes.”<sup>48</sup> Therefore, contrary to section 325.03,<sup>49</sup> leases may not be embraced by section 325.04.

Like section 325.03, the second element of a section 325.04 violation reaches any scheme of special rebates or device of any nature that effects discrimination.<sup>50</sup> However, the second element differs from section 325.03 in one important respect. Rather than covering discriminatory sales of goods between different sections, communities, cities, or any portion thereof,<sup>51</sup> section 325.04 prohibits sales “in any part of this state at prices lower than those exacted by the person elsewhere in the state.”<sup>52</sup> Although, like section 325.03, section 325.04 would require discrimination by a seller between two different purchasers and would also include

43. MINN. STAT. § 325.02 (1976) (emphasis added).

44. See note 25 *supra* and accompanying text.

45. See MINN. STAT. § 325.02 (1976); *id.* § 325.04, para. 2.

46. See notes 26-28 *supra* and accompanying text.

47. See MINN. STAT. § 325.02 (1976) (section 325.04 applies to “the selling . . . of any commodity, article, goods, wares, or merchandise”); Minn. Op. Att’y Gen. 417-E (Aug. 25, 1949) (statute inapplicable to services of photographer); *id.* 681-B (Dec. 2, 1947) (statute inapplicable to services connected with food preparation).

48. See MINN. STAT. § 325.02 (1976); *id.* § 325.04, para. 2.

49. See notes 29-31 *supra* and accompanying text.

50. Compare MINN. STAT. § 325.03 (1976) (“The inhibition hereof against locality discrimination shall embrace any scheme of special rebates . . .”) with *id.* § 325.04, para. 3 (“The inhibition against sales below cost or locality discrimination shall embrace any scheme of special rebates . . .”).

51. See *id.* § 325.03.

52. *Id.* § 325.04, para. 2.

two transactions involving the same purchaser, it is arguable that two sales in the same city would be within the locality discrimination prohibition of section 325.03 but not within the prohibition of section 325.04.

No cases have construed the third element of like quality and grade. If analogy is made to the Robinson-Patman Act, however, this element will be satisfied if the commodities have the same physical appearance and function, even though they have a different brand name or consumer preference.<sup>53</sup>

Unlike section 325.03, the fourth element of section 325.04 focuses only on the anticompetitive effect of the discrimination rather than on the intent or purpose of the seller.<sup>54</sup> Intent or purpose, of course, still may be relevant in assessing the anticompetitive effect.<sup>55</sup>

Defenses to the section 325.04 prohibition against locality discrimination appear in both sections 325.04 and 325.06.<sup>56</sup> Two defenses appear under section 325.04. First, price differentials are permitted if based on differences in overhead expenses, the cost of doing business, or the cost of delivery to the different localities.<sup>57</sup> Second, price differences are permitted if based on a good faith attempt to meet the legal prices of a competitor selling the same commodity in the same locality or trade area.<sup>58</sup>

Section 325.06 reiterates the meeting competition defense of

53. In *FTC v. Borden Co.*, 383 U.S. 637 (1966), the United States Supreme Court held that a seller who distributed evaporated milk under its own nationally advertised brand at a higher price than the same product sold and marketed under private brands was nevertheless selling products of "like grade and quality." *Id.* at 645-46.

54. Compare MINN. STAT. § 325.03 (1976) (prohibiting discrimination "for the purpose or with the effect" of injuring or destroying competition) with *id.* § 325.04, para. 2 (prohibiting discrimination "where the effect of such lower prices may be substantially to lessen competition"). For discussion of intent or effect requirements, see note 36 *supra*.

55. See *In re Forster Mfg. Co.*, 62 F.T.C. 852, 893 (1963) (although "intent is not a necessary element . . . it is certainly relevant in determining whether or not the discriminations . . . have the effect of substantially injuring competition") (emphasis in original), *vacated on other grounds*, 335 F.2d 47 (1st Cir. 1964), *cert. denied*, 380 U.S. 906 (1965); cf. *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 552 (1960) ("[I]t might be argued that the existence of predatory intent bears upon the likelihood of injury to competition . . .") (footnote omitted).

56. See MINN. STAT. § 325.04, para. 2 (1976); *id.* § 325.06.

57. See *id.* § 325.04, para. 2. The terms "cost of doing business" and "overhead expense" are defined as "all current costs of doing business incurred in the conduct of such business." *Id.* § 325.01(7). See also notes 124-25 *infra*.

58. See MINN. STAT. § 325.04, para. 2 (1976). See generally *State v. Wolkoff*, 250 Minn. 504, 508-12, 85 N.W.2d 401, 405-07 (1957) (defense available when seller believes in good faith that prices are lawful; collecting cases), discussed in notes 362-71 *infra* and accompanying text.

section 325.04<sup>59</sup> and provides several additional defenses to a section 325.04 violation. It states that section 325.04 does not apply to close-out sales,<sup>60</sup> sales of seasonal goods "where style is the paramount feature,"<sup>61</sup> sales of perishable goods to prevent loss,<sup>62</sup> sales of damaged goods,<sup>63</sup> and sales by officers acting under court order.<sup>64</sup>

*c. Comparing Section 325.03 and Section 325.04  
Locality Price Discrimination*

Sections 325.03 and 325.04 both prohibit locality price discrimination and the two sections overlap significantly. In addition to the minor differences in wording noted above,<sup>65</sup> at least four more material differences exist between the sections: the persons affected, the commodities covered, the type of competitive injury that must be shown, and the defenses available.

Turning first to the persons affected, it seems clear that both sections apply to wholesalers and sub-jobbers,<sup>66</sup> however, section 325.03 emphasizes the manufacturer while section 325.04 is directed to distributors.<sup>67</sup> Because the application of section 325.03 is limited to producers, manufacturers, and distributors,<sup>68</sup> persons such as retailers and vending machine operators are not encompassed unless they qualify as distributors. Unfortunately, the term "distribution" is not defined. Section 325.04, on the other hand, applies only to retailers,<sup>69</sup> wholesalers,<sup>70</sup> sub-jobbers,<sup>71</sup> and vending machine operators.<sup>72</sup> Thus, section 325.04 does not

59. See MINN. STAT. § 325.06(4) (1976).

60. See *id.* § 325.06(1).

61. *Id.*

62. See *id.*

63. See *id.* § 325.06(2).

64. See *id.* § 325.06(3).

65. See notes 46-55 *supra* and accompanying text.

66. See MINN. STAT. §§ 325.02-.03 (1976); *id.* § 325.04, para. 2.

67. See *id.* § 325.03; *id.* § 325.04, para. 2.

68. See *id.* § 325.03.

69. See *id.* § 325.04, para. 2. A "retailer" is "any person selling a commodity to consumers for use." *Id.* § 325.01(11).

70. See *id.* § 325.04, para. 2. The term "wholesaler" means "any person selling a commodity other than a producer or retailer." *Id.* § 325.01(10); see *id.* § 325.01(9), (11) (defining "producer" and "retailer").

71. See *id.* § 325.04, para. 2. A "sub-jobber" is any person who buys commodities from wholesalers and sells directly to retailers, but who is not a wholesaler or retailer. See *id.* § 325.01(24).

72. See *id.* § 325.04, para. 2. A "vending machines operator" is a person who "owns, services and supplies ten or more merchandise vending machines placed in various locations for dispensing such merchandise to consumers." *Id.* § 325.01(25).

encompass manufacturers or producers.<sup>73</sup>

As to the commodities covered, section 325.04 applies to the sale of commodities in wholesale or retail trade<sup>74</sup> whereas the coverage of section 325.03 seems broader, encompassing sales of any commodity in general use or consumption.<sup>75</sup> Thus, section 325.03 seems to include the commodities affected by the section 325.04 prohibition.

A third distinction lies in the description of the competitive injury that must be shown to establish a violation of these sections. Section 325.03, unlike the Robinson-Patman Act,<sup>76</sup> applies to situations in which a seller discriminates in price "for the purpose or with the effect of injuring a competitor or destroying competition."<sup>77</sup> By contrast, section 325.04, repeating the language in the Robinson-Patman Act, applies to situations "where the effect of such lower prices may be substantially to lessen competition or tend to create a monopoly . . . , or to injure, destroy, or prevent competition."<sup>78</sup> Thus, section 325.03 seems to apply only when an injury is intended or actual injury results from the difference in price, while section 325.04 would apply to the threatened injury, regardless of intent, as well as to actual injury.<sup>79</sup>

It remains unclear, however, whether either of the Minnesota prohibitions applies to "secondary" line injury as well as "primary" line injury.<sup>80</sup> These terms, which have developed in

73. See *id.* § 325.02 (section 325.04 applies only to selling in wholesale or retail trade).

74. See *id.*

75. See *id.* §§ 325.02-.03.

76. See Robinson-Patman Act § 1(a), 15 U.S.C. § 13(a) (1976) (price discrimination prohibited "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition").

77. MINN. STAT. § 325.03 (1976) (emphasis added).

78. *Id.* § 325.04, para. 2 (emphasis added). Compare *id.* with Robinson-Patman Act § 1(a), 15 U.S.C. § 13(a) (1976). For a discussion of intent or effect requirements, see note 36 *supra*.

79. The United States Supreme Court has held that the Robinson-Patman Act reaches "discriminations 'in their incipency' before the harm to 'competition is effected.'" Corn Prod. Refining Co. v. FTC, 324 U.S. 726, 738 (1945). However, only consequences which "would probably have the defined effect on competition," not a "mere possibility" of such effect, would be prohibited. *Id.*

80. The issue has never been presented to the Minnesota Supreme Court. However, two state courts have ruled that their locality discrimination statutes do not apply to secondary line injury. See *Harris v. Capitol Records Distrib. Corp.*, 64 Cal. 2d 454, 460-61, 413 P.2d 139, 143-44, 50 Cal. Rptr. 539, 543-44 (1966); *Rose v. Vulcan Materials Co.*, 282 N.C. 643, 654-55, 194 S.E.2d 521, 528-29 (1973). But see, e.g., CONN. GEN. STAT. ANN. § 35-45(a) (West Cum. Supp. 1978) (direct or indirect discrimination prohibited when competition of recipient of unlawful price or of recipient's customers is affected).

connection with interpretation of the Robinson-Patman Act,<sup>81</sup> refer to price discrimination that injures the seller's competitors (primary line)<sup>82</sup> or that injures competitors of the seller's favored customer (secondary line).<sup>83</sup> The classic example of unlawful price discrimination injuring primary line competition is geographic price discrimination, in which a national or regional seller reduces its prices only in a particular city in an effort to injure a smaller local competitor.<sup>84</sup> Secondary line injury is illustrated by a manufacturer or wholesaler selling at different prices to two customers in the same locality when the two customers are in competition with one another and an advantage may be conferred on the customer receiving the lower price.<sup>85</sup>

Sections 325.03 and 325.04 are obviously aimed at least at primary level injury, undoubtedly contemplating what was just described as geographic price discrimination.<sup>86</sup> Section 325.03 may well be limited to primary line injury because it prohibits only discrimination by a seller for the purpose or effect of "injuring a competitor or destroying competition."<sup>87</sup> Section 325.04, by con-

81. See Note, *Unlawful Primary Line Price Discriminations: Predatory Intent and Competitive Injury*, 68 COLUM. L. REV. 137, 138-39 (1968). Although the terms "primary" and "secondary" line injury originated with interpretation of the Robinson-Patman Act, the concepts matured under the Clayton Act, ch. 323, § 2(a), 38 Stat. 730 (1914) (current version at 15 U.S.C. § 13 (1976)). See *George Van Camp & Sons Co. v. American Can Co.*, 278 U.S. 245, 252-54 (1929) (secondary line injuries held unlawful under Clayton Act).

82. See *Rose v. Vulcan Materials Co.*, 282 N.C. 643, 654-55, 194 S.E.2d 521, 528-29 (1973); Note, *supra* note 81, at 139. See generally McCarthy, *supra* note 3, at 183-84.

83. See *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 545-46 (1960); *Rose v. Vulcan Materials Co.*, 282 N.C. 643, 654-55, 194 S.E.2d 521, 528-29 (1973); Note, *supra* note 81, at 139. See generally McCarthy, *supra* note 3, at 184-87.

84. See *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 538-41 (1960) (brewer with national distribution reduced prices in single market, allegedly adversely affecting sales of local brewer); Note, *supra* note 81, at 139. While a primary line violation under the Robinson-Patman Act requires probable injury to the seller's competitors, it does not require injury to the purchaser's competitors. See, e.g., *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 702 (1966); *FTC v. Anheuser-Busch, Inc.*, 363 U.S. at 545; *Checker Motors Corp. v. Chrysler Corp.*, 283 F. Supp. 876, 889 (S.D.N.Y. 1968), *aff'd*, 405 F.2d 319 (2d Cir.), *cert. denied*, 394 U.S. 999 (1969). Injury to the competitors of a purchaser resulting from the acts of the seller—that is, secondary line injury—is a separate type of violation of the Robinson-Patman Act. See cases cited in note 85 *infra*.

85. See *FTC v. Morton Salt Co.*, 334 U.S. 37, 47 (1948) (discounts to certain wholesale and retail purchasers buying larger quantities than competing wholesale and retail purchasers could be a violation); *George Van Camp & Sons Co. v. American Can Co.*, 278 U.S. 245, 254 (1929) (seller had monopoly on canning process and sold product to plaintiff's competition for 20% less); *Rose v. Vulcan Materials Co.*, 282 N.C. 643, 654-55, 194 S.E.2d 521, 528-29 (1973) (seller had no primary line of competition; at best, secondary line injury existed that was lawful under state statute).

86. See MINN. STAT. § 325.03 (1976); *id.* § 325.04, para. 2.

87. *Id.* § 325.03.



trast, encompasses both injury to "competition with the person selling at such lower prices"<sup>88</sup> and, similar to the Robinson-Patman Act,<sup>89</sup> the lessening of competition "in any line of business."<sup>90</sup> Thus, section 325.04 probably was intended to encompass competitive injury occurring at levels beyond the primary line.<sup>91</sup> However, section 325.04 arguably may include only primary line injury. That section, as well as section 325.03, applies if two different purchasers are at different locations and, therefore, perhaps not in competition. Section 325.04 only applies if the customers are in different "part[s] of this state."<sup>92</sup> Use of this phrase compromises the apparent legislative intent reflected in the "any line of business" language, suggesting that section 325.04 may not encompass secondary line injuries.

Differences also lie in the defenses available under sections 325.03 and 325.04. The section 325.06 defenses—close-out sales, sales of seasonal, perishable, or damaged goods, and sales under court order—apply to section 325.04 but not to section 325.03.<sup>93</sup> Each section also has different provisions regarding quality discounts. Section 325.03 permits as a defense the making of an allowance for differences in the grade or quality of a commodity,<sup>94</sup> indicating a defense is available if the price difference is a result of cost savings associated with the lower-grade product.<sup>95</sup> Inferentially, then, selling the higher grade product at a lower price than is charged for the lower grade would be prohibited if the other

88. *Id.* § 325.04, para. 2.

89. See Robinson-Patman Act § 1(a), 15 U.S.C. § 13(a) (1976) ("to lessen competition or tend to create a monopoly in any line of commerce").

90. MINN. STAT. § 325.04, para. 2 (1976).

91. *Cf.* *George Van Camp & Sons v. American Can Co.*, 278 U.S. 245, 253-54 (1929) (phrase "in any line of business" in Clayton Act used to prohibit secondary line type of injury).

92. MINN. STAT. § 325.04, para. 2 (1976).

93. See *id.* § 325.06(4). Section 325.06 is perhaps the most puzzling section in the entire Act. The exemptions it provides are expressly applicable to locality discrimination under section 325.04, but it makes no reference to locality discrimination under section 325.03. Further, the section states that certain definitions in section 325.01, subdivisions 2 through 6 do not apply to sales exempt under section 325.06. What could that mean? Finally, section 325.06 provides that section 325.05 does not apply to any sales described in section 325.06. MINN. STAT. § 325.05 (1976) provides that the invoice cost of goods purchased at sales outside the ordinary channels of trade may not be used to justify a price lower than the replacement cost unless the sale is exempt under section 325.06. Does this mean that the purchase price in an exempt sale under section 325.06 can be used to justify cost under the sale-below-cost prohibition in paragraph 1 of section 325.04?

94. See *id.* § 325.03.

95. *Cf.* note 473 *infra* (discussing like grade and quality requirement under Robinson-Patman Act).

requisites for a violation were present. On the other hand, section 325.04, like the Robinson-Patman Act,<sup>96</sup> is limited in the first instance to sales of commodities having "like qualities and grades."<sup>97</sup> Presumably, section 325.04 is inapplicable if the commodities differ in quality or grade.<sup>98</sup> This section does not preclude a seller of differing commodities from charging different prices totally unrelated to cost savings.

Another difference in the available defenses relates to the legality of quantity discounts. Section 325.03 provides for an allowance based on differences in quantity.<sup>99</sup> Thus, section 325.03, like the predecessor of the Robinson-Patman Act,<sup>100</sup> may well be avoided simply by selling to customers at different prices and in different quantities.<sup>101</sup> By contrast, section 325.04, as originally enacted in 1937, applied only to sales of "like quantities and grades."<sup>102</sup> The law was changed in 1939 by apparent inadvertent

96. See Robinson-Patman Act, § 1(a), 15 U.S.C. § 13(a) (1976) ("it shall be unlawful for any person . . . to discriminate in price between different purchasers of commodities of like grade and quality"); notes 473-75 *infra* and accompanying text. The federal courts have had difficulty determining when commodities are of like grade and quality. While there are no safe generalizations to be made in this area, it appears that when the commodities are physically similar and are put to similar uses they are of like grade and quality. See, e.g., *FTC v. Borden Co.*, 383 U.S. 637, 644 (1966) (products physically identical); *Pacific Eng'r & Prod. Co. v. Kerr-McGee Corp.*, 1974-1 Trade Cases (CCH) ¶ 75,054 (D. Utah) (manufacturer of rocket fuel that produced compounds with varied blends of same chemicals produced commodities of like grade and quality). But see, e.g., *Morning Pioneer, Inc. v. Bismarck Tribune Co.*, 342 F. Supp. 1138 (D.N.D. 1972) (newspaper not of like grade and quality when sold in different cities), *aff'd on other grounds*, 493 F.2d 383 (8th Cir.), *cert. denied*, 419 U.S. 836 (1974). It has been suggested that two factors can be used to determine when commodities are of like grade and quality. First, are the commodities physically similar or identical? Second, do the commodities have distinct or legitimate physical differences that affect consumer use, preference, or marketability? See 16C J. VON KALINOWSKI, *BUSINESS ORGANIZATIONS ANTITRUST LAWS AND TRADE REGULATION* § 25.01, at 25-7 (1976).

97. MINN. STAT. § 325.04, para. 2 (1976).

98. Reference to cases decided under the Robinson-Patman Act § 1(a), 15 U.S.C. § 13(a) (1976), indicates that a finding that the commodities sold were of like grade and quality is a condition precedent to the applicability of the Act. See, e.g., *Morning Pioneer, Inc. v. Bismarck Tribune Co.*, 342 F. Supp. 1138 (D.N.D. 1972), *aff'd on other grounds*, 493 F.2d 383 (8th Cir.), *cert. denied*, 419 U.S. 836 (1974).

99. See MINN. STAT. § 325.03 (1976) (allowance for differences in "grade, quality, or quantity").

100. See Clayton Act, ch. 323, § 2(a), 38 Stat. 730 (1914) (current version at 15 U.S.C. § 13 (1976)) ("nothing . . . shall prevent discrimination in price . . . on account of differences in the grade, quality or quantity of the commodity").

101. See, e.g., *Goodyear Tire & Rubber Co. v. FTC*, 101 F.2d 620, 624 (6th Cir. 1939); *American Can Co. v. Ladoga Canning Co.*, 44 F.2d 763, 767 (7th Cir. 1930); *National Biscuit Co. v. FTC*, 299 F. 733, 739 (2d Cir. 1924).

102. See Act of Mar. 30, 1937, ch. 116, pt. 2, § 2, para. 2, 1937 Minn. Laws 182 (current version at MINN. STAT. § 325.04, para. 2 (1976)).

substitution of the letter *l* for the letter *n* in the word "quantities."<sup>103</sup> However, because this change in wording was effected not by act of the Legislature but by typographical error in the published edition of the 1939 session laws,<sup>104</sup> it is unclear whether the alteration from quantities to qualities has any legal effect.<sup>105</sup> The question is not purely academic. Because the error has been carried over to the present law,<sup>106</sup> arguably section 325.04 only applies to sales of like quantities.

Another defense—meeting competition—also appears in both sections.<sup>107</sup> However, section 325.03 permits this defense only when the competition is "local,"<sup>108</sup> whereas section 325.04 permits the defense if the competition is in the "same locality" or "trade area."<sup>109</sup> Moreover, section 325.04, unlike section 325.03, is lim-

103. See Act of Apr. 22, 1939, ch. 403, § 1, para. 2, 1939 Minn. Laws 795 ("like qualities [*sic*] and grades") (current version at MINN. STAT. § 325.04, para. 2 (1976)). In addition, the change was not printed in italics, further indicating that it was the result of error rather than legislative act. The original act, as filed in the office of the Minnesota Secretary of State, does contain the phrase "like quantities and grades." The only conclusion that can be drawn from this evidence is that when printed in the 1939 volume of the session laws, the error was perpetuated. In 1940, the error was further obscured when Mason Publishing Company, in compiling the 1940 supplement to the statutes, changed "qualities" to "qualities." See MINN. STAT. § 3976-41 (Mason Supp. 1940).

104. See note 103 *supra*. The change makes Minnesota law consistent with the Robinson-Patman Act. Compare MINN. STAT. § 325.04, para. 2 (1976) ("like qualities and grades") with Robinson-Patman Act § 1(a), 15 U.S.C. § 13(a) (1976) ("like grade and quality").

105. The uncertainty stems from the rules of statutory construction. In *Welscher v. Myhre*, 231 Minn. 33, 42 N.W.2d 311 (1950), the court was presented with a situation in which the revisor of statutes had inadvertently omitted language from an act in compiling the 1945 edition of the statutes. The court stated as a general principle that:

If the statutory language remaining after such omission is clear and unambiguous in its expression of legislative intent, there is then no room for construction or interpretation and no reference may be made to prior enactments. Prior statutes may be resorted to only for the purpose of solving, and not for the purpose of creating, an ambiguity.

*Id.* at 36-37, 42 N.W.2d at 313 (citations omitted). See also *State ex rel. Bergin v. Washburn*, 224 Minn. 269, 28 N.W.2d 652 (1947) (changes made in codification control over prior versions of statute when change is substantive and unambiguous). See generally C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION §§ 28.12-.13 (4th rev. 1971).

106. See MINN. STAT. § 325.04, para. 2 (1976).

107. See *id.* § 325.03 (the Act "shall not prevent any person, firm, or corporation from, in good faith, meeting local competition"); *id.* § 325.04, para. 2 ("nothing shall prevent . . . differences in prices in an endeavor made in good faith to meet the legal prices of a competitor").

108. See *id.* § 325.03 ("within any one section, community, or city").

109. *Id.* § 325.04; see *McElhone v. Geror*, 207 Minn. 580, 589, 292 N.W. 414, 419 (1940) ("same locality" and "trade area" are "common terms, susceptible of reasonable application by and to . . . the evidence").

ited to meeting the "legal" prices of a competitor.<sup>110</sup>

Finally, both sections contain widely differing "cost savings" defenses, permitting a lower price to be charged by a seller if it costs less to sell to the customer receiving the lower price.<sup>111</sup> Under section 325.03 the defense is available in the sense that no unlawful price discrimination exists "after equalizing the distance from the point of production, manufacture, or distribution and freight rates therefrom."<sup>112</sup> Thus, the section appears to permit different prices based on variances in shipment costs. Section 325.04 permits price discrepancies for differences not only in the costs of delivery, but also in overhead expenses and the costs of doing business.<sup>113</sup> The latter two terms, which apparently are synonymous, are defined to include delivery costs, wages and salaries, maintenance expenses, depreciation, insurance, taxes, and other fixed and incidental costs.<sup>114</sup> In other words, they include total costs, not simply variable costs.<sup>115</sup>

## 2. Sales Below Cost

In addition to prohibiting locality price discrimination, section 325.04 of Minnesota Statutes also prohibits certain sales below cost.<sup>116</sup> Like the section 325.04 prohibition against locality price discrimination, the prohibitions against sales below cost apply only to retailers, wholesalers, sub-jobbers, and vending machine operators.<sup>117</sup>

110. Compare MINN. STAT. § 325.04, para. 2 (1976) with *id.* § 325.03.

111. Compare *id.* § 325.04, para. 2 with *id.* § 325.03. The defense may be constitutionally required. See *Great Atl. & Pac. Tea Co. v. Ervin*, 23 F. Supp. 70, 76-78 (D. Minn. 1938) (per curiam) (finding 1937 Unfair Trade Practices Act unconstitutional in part due to failure to recognize actual marketing practices).

112. MINN. STAT. § 325.03 (1976).

113. See *id.* § 325.04, para. 2.

114. See *id.* § 325.01(7).

115. The term "total" cost refers to all fixed and variable costs, which represent the entire expense of operating a business. See Legman, *Accounting for a Manufacturing Business* in ATTORNEY'S HANDBOOK OF ACCOUNTING 13-14 to -15 (rev. ed. H. Sellin ed. 1971). Fixed costs are costs that do not vary with production, including depreciation, taxes, and management expenses. See Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 700 (1975). Variable costs are dependent upon the amount or quantity of goods produced, including such items as labor, materials and energy consumption. See *id.* The apparent effect of the inclusive definition of "cost of doing business or overhead expense" in the Act is to reference a higher price level than would be present if the definition merely included variable costs.

116. See MINN. STAT. § 325.04, para. 1 (1976).

117. Compare *id.* § 325.04, para. 2 (locality price discrimination) with *id.* § 325.04, para. 1 (sales-below-cost prohibition).

Essentially, a violation has two elements:

- (1) selling or offering to sell any commodity at less than cost, or giving or offering to give away any commodity,
- (2) for the purpose or with the effect of injuring a competitor or destroying competition.<sup>118</sup>

The prohibitions against sales below cost, like the prohibition against locality price discrimination,<sup>119</sup> applies to "discrimination" that violates the spirit and intent of the Act.<sup>120</sup>

To refer to a sale below cost as "discrimination" is, of course, a misnomer because discrimination contemplates selling or furnishing the same item to different persons at different prices.<sup>121</sup> However, the prohibition against sales below cost does not require two sales of the same product at different prices.<sup>122</sup> Theoretically, a single sale below cost is a violation.

Perhaps the most critical aspect of establishing a violation is proving the "cost" of the commodity. Although section 325.04 applies to retailers, wholesalers, sub-jobbers, and vending machine operators,<sup>123</sup> "cost" is defined only with respect to wholesalers or retailers.<sup>124</sup> As applied to a wholesale or retail vendor,

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118. *Id.* § 325.02; *id.* 325.04, para. 1. Section 325.04 could be read to require injury to competition in the case of *giving* away any commodity but not in the case of *selling* a commodity at less than cost. However, the statute has been interpreted as requiring injury to or destruction of competition in all cases before a violation can exist. *See State v. Applebaums Food Mkts., Inc.*, 259 Minn. 209, 218, 106 N.W.2d 896, 902 (1960).

119. *See* MINN. STAT. § 325.03 (1976); *id.* § 325.04, paras. 2-3.

120. *Id.* § 325.04, para. 3. This paragraph applies to both sales below cost and locality discrimination and contains language similar to an equivalent provision in section 325.03. Thus, like the Robinson-Patman Act § 1, 15 U.S.C. § 13 (1976), the Minnesota prohibitions purport to reach indirect as well as direct forms of price discrimination. However, unlike the Robinson-Patman Act, the Minnesota statutes do not single out certain indirect forms of discrimination as being illegal regardless of their competitive effect. *Compare id.* § 1(c)-(e), 15 U.S.C. § 13(c)-(e) with MINN. STAT. § 325.03 (1976) and *id.* § 325.04, para. 3.

121. *See Kentucky Traction & Terminal Co. v. Murray*, 176 Ky. 593, 597, 195 S.W. 1119, 1121 (1917) (in construing statute prohibiting discrimination by common carriers, court defined "discrimination" as the failure to treat all alike under substantially similar conditions); L. SULLIVAN, *supra* note 2.

122. *See* MINN. STAT. § 325.04, para. 1 (1976) (applying to one "who sells . . . at less than the cost thereof to such vendor").

123. *See id.*; notes 69-73 *supra* and accompanying text.

124. *See* MINN. STAT. § 325.01(5) (1976). Probably, the absence of a definition for "cost" with respect to vending machine operators can be filled by viewing them as retailers because of the similarity in the definition of retailers and vending machine operators. *Compare id.* § 325.01(2) (retailers are sellers to consumers) with *id.* § 325.01(25) (vending machine operators are sellers to consumers). While "sub-jobbers" are defined specifically not to include wholesalers or retailers, *see id.* § 325.01(24), "sub-jobbers" are defined as

“cost” means the lower of either actual current invoice or replacement cost, plus sales taxes, and the cost of doing business “at that location.”<sup>125</sup> Constitutional infirmities in the original definition of “cost”<sup>126</sup> prompted the Legislature to clarify the terms referred to in the definition.<sup>127</sup> A manufacturer’s current published price list, less published trade discounts, is *prima facie* evidence of invoice or replacement cost.<sup>128</sup> Moreover, the invoice cost of commodities purchased by a wholesale or retail vendor at bankruptcy sales, close-out sales, or other sales outside of the ordinary channels of trade generally cannot be used in calculating costs.<sup>129</sup>

The second element of a violation—competitive injury—can be

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sellers performing the “functions of a wholesaler.” *Id.* § 325.01(24). Thus, “sub-jobbers” probably should be viewed as wholesalers for the purpose of establishing “cost.”

125. *Id.* § 325.01, subd. 5(1). *See generally id.* § 325.01(7) (definition of “cost of doing business” includes the following fixed and incidental costs: “[l]abor, including salaries and bonuses of executives and officers, rent, depreciation, selling costs, maintenance of equipment, delivery costs, all types of licenses, taxes, insurance, and advertising”); note 57 *supra*.

126. In *Great Atl. & Pac. Tea Co. v. Ervin*, 23 F. Supp. 70, 78-79 (D. Minn. 1938) (*per curiam*), the court found the original definition of “cost” as “the manufacturer’s list price less his published discounts plus the cost of doing business,” Act of Mar. 30, 1937, ch. 116, pt. 2, § 3, para. 3, 1937 Minn. Laws 182, unconstitutional because it failed to account for “what a merchant has actually paid in the ordinary course of trade for his goods.” 23 F. Supp. at 79. The court explained:

To treat a sale of goods which yields to a merchant all that he has actually expended for his goods plus his cost of doing business, as an unfair trade practice merely because the manufacturer has published lists of prices and discounts on the basis of which it appears that the merchant paid more for his goods than he actually did pay, seems unjustifiable.

*Id.*

127. *See* Act of Apr. 22, 1939, ch. 403, § 2, 1939 Minn. Laws 796 (current version at MINN. STAT. § 325.01(5) (1976)).

128. *See* MINN. STAT. § 325.01, subd. 5(2) (1976). In reviewing the original act’s definition of cost, which it found unconstitutional, the court in *Great Atl. & Pac. Tea Co. v. Ervin*, 23 F. Supp. 70 (D. Minn. 1938) (*per curiam*) remarked:

Had the Legislature seen fit to define “cost” as “actual cost plus the cost of doing business by said vendor” and to provide that where goods were purchased by a merchant from a manufacturer who had a published list price, such list price less published discounts, in effect at the time the merchant acquired the goods, should be *prima facie* evidence of their actual cost, an entirely different situation would be presented, since there would seem to be nothing unreasonable in assuming, in the absence of proof to the contrary, that a merchant had purchased at list price less published discounts.

*Id.* at 79. In revising the Act after the *Great Atlantic & Pacific Tea Co.* case, the Minnesota Legislature adopted the court’s advice. *Compare id.* with Act of Apr. 22, 1939, ch. 403, § 2, para. 3, 1939 Minn. Laws 796 (current version at MINN. STAT. § 325.01(5) (1976)).

129. *See* MINN. STAT. § 325.05 (1976). In addition, MINN. STAT. § 325.05 (1976) provides that purchases outside the ordinary channels cannot justify a price lower than one based upon replacement cost unless the goods are kept separate and advertised as purchased other than through ordinary channels of trade.

satisfied by an intent to cause injury as well as the actual effect of causing injury.<sup>130</sup> This element is similar to the provision in the section 325.03 prohibition against locality price discrimination,<sup>131</sup> but different from the section 325.04 prohibition against locality price discrimination, which requires only threatened injury to competition.<sup>132</sup>

Several types of transactions are exempt under section 325.06 from the prohibition in section 325.04 against sales below cost.<sup>133</sup> When public notice is given, close-out sales, sales of perishable goods, sales of seasonal commodities when style is the paramount feature,<sup>134</sup> and sales of damaged or deteriorated goods are exempt.<sup>135</sup> Transactions by an officer acting under court order are also exempt<sup>136</sup> as are sales, offers, or gifts made in a good faith attempt to meet the legal prices of a competitor.<sup>137</sup>

The exemption for meeting competition appeared in the 1937 enactment of the Unfair Trade Practices Act<sup>138</sup> and was amended in 1941 to make it available only to meet the "legal" prices of a competitor.<sup>139</sup> In 1957, it was further amended by providing that a competitor's retail price of less than eight percent above actual current delivered invoice cost would be prima facie evidence that the price was not legal.<sup>140</sup> Similarly, prima facie evidence of an unlawful wholesale price of a competitor would be established if the price charged was less than two percent above actual current

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130. See *id.* § 325.04, para. 1 ("for the purpose or with the effect of" causing injury). For discussion of intent or effect requirements, see note 36 *supra*.

131. See notes 34-37 *supra* and accompanying text.

132. See notes 54-55, 76-78 *supra* and accompanying text.

133. See MINN. STAT. § 325.06 (1976).

134. *Id.* § 325.06(1).

135. *Id.* § 325.06(2).

136. *Id.* § 325.06(3).

137. *Id.* § 325.06(4).

138. Act of Mar. 30, 1937, ch. 116, pt. 2, § 6(d), 1937 Minn. Laws 184 (current version at MINN. STAT. § 325.06(4) (1976)).

139. See Act of Apr. 21, 1941, ch. 326, § 1, para. 2, 1941 Minn. Laws 617 (current version at MINN. STAT. § 325.04, para. 2 (1976)); *id.* § 3(d), 1941 Minn. Laws 620 (current version at MINN. STAT. § 325.06(4) (1976)). According to one commentator, the change from "local" to "legal" was necessary because when "local" was employed,

serious evasions developed. One merchant would begin unfair competition by price slashing in a given locality, and then the other merchants in the locality would, under the act, be privileged to meet this competition. In the ensuing price war, matters became so confused that it was impossible for enforcement officers to know who had begun the unfair competition.

26 MINN. L. REV. 245, 245 n.135 (1942).

140. See Act of Apr. 27, 1957, ch. 822, § 3, 1957 Minn. Laws 1162 (current version at MINN. STAT. § 325.06(4), para. 2 (1976)).

delivered invoice cost.<sup>141</sup> If a sale is made to meet a competitor's price that is less than these established levels, the seller cannot rely upon the meeting competition defense unless he shows the competitor's price was in fact lawful.<sup>142</sup> The 1957 Legislature also added a provision to section 325.06 allowing retailers or wholesalers to determine the legality of a competitor's price by asking the Commissioner of the Department of Business Development to ascertain and disclose the current manufacturer's published list prices less published trade discounts on any commodity.<sup>143</sup> The Commissioner was required to ascertain and disclose the information within forty-eight hours of the request.<sup>144</sup> Failure by a seller to make this request before reducing prices below cost to meet the price of a competitor is deemed *prima facie* evidence, presumably rebuttable, of a failure to act in good faith.<sup>145</sup>

### 3. *Presumptions Establishing a Prima Facie Case*

Section 325.075 contains rebuttable presumptions<sup>146</sup> making certain sales violative of the Act Against Unfair Discrimination and Competition.<sup>147</sup> Although applicable to both locality price discrimination and sales below cost,<sup>148</sup> these presumptions make little sense in the context of locality discrimination because they do not describe sales at different prices.<sup>149</sup> The presumptions are unavailable unless two requirements have been satisfied: (1) the price charged by the seller must have been below the minimum markup set forth in the statute, and (2) this price must have been charged for the purpose or effect of injuring competition.<sup>150</sup>

141. See *id.* (current version at MINN. STAT. § 325.06(4), para. 3 (1976)).

142. See MINN. STAT. § 325.06(4) (1976).

143. See Act of Apr. 27, 1957, ch. 822, § 3, 1957 Minn. Laws 1163 (current version at MINN. STAT. § 325.06(4), para. 4 (1976)).

144. The Legislature has since transferred the duties of the Commissioner to the Attorney General. See Act of May 4, 1967, ch. 302, § 1(2), 1967 Minn. Laws 477 (current version at MINN. STAT. § 325.06(4), para. 4 (1976)).

145. See MINN. STAT. § 325.06(4), para. 5 (1976).

146. See Minn. Op. Att'y. Gen. 417-E (Mar. 23, 1949) (presumption may be overturned by proof of no intent to injure competitors and no anticompetitive effect); *id.* 417-E (Nov. 24, 1947) (when retailer proves that actual cost is less than *prima facie* 8% rule, presumption of cost overcome).

147. See MINN. STAT. § 325.075 (1976).

148. The presumptions in section 325.075 apply to violation of sections 325.02 to 325.07. *Id.* § 325.075, paras. 1, 3-4.

149. See *id.* The statute refers only to sales made at less than certain percentages above cost, therefore ignoring the fact that the prohibitions against locality discrimination refer to discriminatory prices in at least two sales regardless of cost.

150. See *id.* § 325.075, para. 1.



The minimum markups set forth in section 325.075 parallel the section 325.06 presumptions of price legality in the context of establishing the defense of meeting a "legal" price of a competitor.<sup>151</sup> Essentially, the markups represent a presumption of the vendor's overhead and cost of doing business. Thus, illegality is presumed unless retailers place a minimum markup of eight percent,<sup>152</sup> and wholesalers and sub-jobbers a minimum markup of two percent,<sup>153</sup> above what they pay for the commodity. Nevertheless, wholesalers may sell without a markup if the commodity is sold to a sub-jobber, vending machine operator, or another wholesaler.<sup>154</sup> On the other hand, sales by a "vendor"<sup>155</sup> at a price at least fifteen percent above what was paid for the commodity is an absolute defense against *any* form of violation.<sup>156</sup> The predecessor of this section, enacted in 1937,<sup>157</sup> had provided that a sale by a retail vendor at less than ten percent above what had been paid was *prima facie* evidence of a violation.<sup>158</sup> However, no prosecution could lie for sales by a vendor at prices fifteen percent above what was paid.<sup>159</sup> What is particularly remarkable about the 1937 legislation and what might have rendered it largely ineffective is the relatively narrow range between *prima facie* unlawful and absolutely permissible prices,<sup>160</sup> a feature still retained in

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151. Compare *id.* § 325.06(4), para. 2 with *id.* § 325.075, para. 1.

152. *Id.* § 325.075, para. 1.

153. *Id.* § 325.075, para. 3.

154. See *id.* (applying only to sales by wholesale vendors or sub-jobbers to retailers).

155. Use of the word "vendor" in paragraph 2 of section 325.075 creates an ambiguity in the law. This paragraph, defining sales deemed conclusively lawful, immediately follows the provision containing the presumed violation applicable to retail vendors. Therefore, paragraph 2 may be a mere elaboration of the earlier paragraph with no intended application to wholesale vendors. This conclusion is supported by the fact that the presumptions, when originally enacted, were applicable solely to retail sales. See Act of Mar. 30, 1937, ch. 116, pt. 2, § 3, 1937 Minn. Laws 183 (current version at MINN. STAT. § 325.075, paras. 1-2 (1976)). The last two paragraphs relating to wholesale vendors contain no *prima facie* valid sale provision applicable to wholesalers. See MINN. STAT. § 325.075, paras. 3-4 (1976).

156. MINN. STAT. § 325.075, para. 2 (1976). Arguably, the 15% provision is applicable to both retailers and wholesalers. When the Legislature amended the section, it did not add "retail" before "vendor" in the second paragraph. See *id.* By not modifying "vendor," the Legislature may have intended the provision to apply to both retail and wholesale vendors. Otherwise, the statute contains no provision allowing wholesalers an opportunity for making a conclusively lawful sale.

157. Act of Mar. 30, 1937, ch. 116, pt. 2, § 3, paras. 5-6, 1937 Minn. Laws 182 (current version at MINN. STAT. § 325.075, para. 2 (1976)).

158. See *id.*

159. See *id.*

160. See *id.* (the price range was only five percent).

the present statutes.<sup>161</sup> Similarly, the bar against prosecution is incomprehensible when applied to locality discrimination because that prohibition is based not on cost but on unequal treatment in two or more sales.

The second requirement of a presumed violation—purpose or effect of injuring competition—substantially weakens the impact of the statutory presumptions.<sup>162</sup> While appearing to lessen the burden of proving a possible sale below cost, the statutory presumptions are weakened by requiring a victim to prove an anti-competitive intent or effect. This element is similar to the anti-competitive intent or effect required to prove a violation of the section 325.03 locality price discrimination prohibition<sup>163</sup> and of the section 325.04 sales-below-cost prohibition.<sup>164</sup> Thus, the net effect of the presumptions is difficult to assess. Sales below cost may be presumed but the necessary element of purpose or effect of injuring competition still will have to be shown.

### *B. Statutes Applying to Particular Commodities*

The Minnesota Legislature also has been particularly concerned from time to time with unfair business practices involving certain commodities. Provisions prohibiting price discrimination or sales below cost sometimes appear among statutes governing particular products. Set forth below is a discussion of the price discrimination and sales-below-cost statutes applicable to petroleum products,<sup>165</sup> farm and dairy products,<sup>166</sup> cigarettes,<sup>167</sup> beer,<sup>168</sup> liquor,<sup>169</sup> and prescription drugs.<sup>170</sup> A person dealing with a price discrimination or sales-below-cost question concerning other particular products should read with care any statutes governing the

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161. Presently, the price range between lawful and unlawful prices is seven percent. See MINN. STAT. § 325.075, paras. 1-2 (1976).

162. See *id.* § 325.075, para. 1.

163. See *id.* § 325.03; notes 34-37 *supra* and accompanying text.

164. See MINN. STAT. § 325.04, para. 1 (1976); notes 130-32 *supra* and accompanying text.

165. See MINN. STAT. § 325.82 (1976); notes 172-84 *infra* and accompanying text.

166. See MINN. STAT. §§ 17.14-.19 (1976) (farm products); *id.* § 32A.04 (dairy products); notes 185-213 *infra* and accompanying text.

167. See MINN. STAT. §§ 325.64-.76 (1976), as amended by Act of Apr. 5, 1978, ch. 793, §§ 72, 98, 1978 Minn. Laws 1210, 1217; notes 214-23 *infra* and accompanying text.

168. See MINN. STAT. §§ 325B.01-.17 (Supp. 1977); notes 224-26 *infra* and accompanying text.

169. See MINN. STAT. § 340.114 (1976); notes 227-33 *infra* and accompanying text.

170. See MINN. STAT. § 151.061 (1976); notes 234-38 *infra* and accompanying text.

sale of such products as the specific prohibitions frequently are found among other, more innocuous provisions.<sup>171</sup>

### 1. *Petroleum Products*

The earliest Minnesota legislation dealing with unfair price discrimination was a 1907 act prohibiting locality discrimination in the distribution of petroleum products.<sup>172</sup> In language similar to the Act Against Unfair Discrimination and Competition,<sup>173</sup> the petroleum statute, presently section 325.82,<sup>174</sup> prohibits any petroleum dealer<sup>175</sup> from "intentionally, or otherwise," discriminating in price in the sale of petroleum products between different sections of the state.<sup>176</sup> No violation occurs, however, unless the dealer's purpose was to destroy a competitor's business or to create a monopoly.<sup>177</sup> In determining price, allowance is made for differences in quality and transportation costs.<sup>178</sup> Corporations violating the statute may be dissolved, if domestic, or ousted, if foreign.<sup>179</sup> Contracts made in violation of the statute are void and,

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171. The following statutes are not described specifically in this Article: MINN. STAT. § 35.58 (1976) (price discrimination in sale of hog cholera serum and virus); *id.* § 65B.13 (prohibiting rate discrimination in issuing automobile insurance policies); *id.* § 72A.12(3)-(4) (prohibiting rate discrimination and rebates in life insurance policies); *id.* § 72A.20(8)-(10) (rate discrimination and rebates prohibited as unfair and deceptive acts in selling accident, health, or life insurance); *id.* § 126.18 (certain textbooks sold at lower prices outside Minnesota must be offered for the same price in Minnesota); *id.* § 235.10 (locality discrimination in purchase of grain).

172. See Act of Apr. 20, 1907, ch. 269, 1907 Minn. Laws 363 (current version at MINN. STAT. § 325.82 (1976)).

173. Compare MINN. STAT. § 325.03 (1976) (no discrimination allowed "between different sections, communities, or cities of this state by selling or furnishing such commodity . . . at a lower price or rate in one section, community, or city, or any portion thereof, than such person . . . charges . . . in another section, community, or city, or any portion thereof") with *id.* § 325.82(1) (no discrimination allowed "between different sections, communities, or cities of this state, by selling such commodity at a lower rate in one section, community, or city than is charged for such commodity . . . in another section, community, or city").

174. *Id.* § 325.82.

175. A petroleum dealer would include "[a]ny person, firm, company, association, or corporation, foreign or domestic, doing business in this state, and engaged in the production, manufacture, or distribution of petroleum or any of its products." *Id.* § 325.82(1).

176. *Id.*

177. See *id.*

178. See *id.*

179. *Id.* § 325.82(6)-(7). In *State ex rel. Young v. Standard Oil Co.*, 111 Minn. 85, 126 N.W. 527 (1910), the defendant argued that the statutory procedure that requires the Secretary of State to refer complaints charging a corporation with unlawful discrimination to the Attorney General, see MINN. STAT. § 325.82(5) (1976), had not been followed and thus the conviction against it was invalid. The court determined that the statute did not provide the exclusive remedy and the Attorney General on his own initiative properly

if executory, may be rescinded.<sup>180</sup>

The statute specifically provides that neither the remedies in the Act nor the Act itself are intended to displace any other law.<sup>181</sup> Therefore, the provisions of the Act Against Unfair Discrimination and Competition—a statute of general application—also should apply to the sale of petroleum.<sup>182</sup> This is anomalous because, for example, a seller of petroleum prosecuted under section 325.82 would have no meeting competition defense,<sup>183</sup> whereas that defense would be available if prosecution were under the general act.<sup>184</sup>

## 2. Farm and Dairy Products

Three statutes apply to farm and dairy commodities. One statute applies to the *sale* of dairy commodities<sup>185</sup> and the other two apply to the *purchase* of either dairy<sup>186</sup> or farm products.<sup>187</sup>

The Dairy Industry Unfair Trade Practices Act,<sup>188</sup> passed by the 1957 Legislature,<sup>189</sup> contains far-reaching provisions apparently intended to eliminate interlocking relationships between, or perceived favoritism among, manufacturers and distributors of dairy products.<sup>190</sup> Included among the numerous limitations upon interrelationships of manufacturers and distributors of “selected dairy products”<sup>191</sup> are several provisions dealing explicitly with price discrimination or sales below cost.

One provision forbids any manufacturer, distributor, or wholesaler from charging a combined price for any selected dairy prod-

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could seek ouster through the courts as well as through reference by the Secretary of State. 111 Minn. at 93-94, 126 N.W. at 528.

180. MINN. STAT. § 325.82(3) (1976) (“All contracts or agreements made in violation of any provisions [of this section] shall be void and any money or property paid or transferred . . . shall be paid back . . . and on failure to so repay, then purchaser may recover back, in a civil action . . .”).

181. *Id.* § 325.82(8).

182. *See id.* §§ 325.02-.075.

183. *See id.* § 325.82.

184. *See id.* § 325.06; notes 107-10 *supra* and accompanying text.

185. *See* MINN. STAT. §§ 32A.04(1)(l)-(m), (o), .07(a) (1976).

186. *See id.* § 32.11.

187. *See id.* § 17.15.

188. *Id.* §§ 32A.01-.09.

189. Act of Apr. 27, 1957, ch. 821, 1957 Minn. Laws 1148 (current version at MINN. STAT. §§ 32A.01-.09 (1976)).

190. *See* MINN. STAT. § 32A.02 (1976) (legislative declaration of public policy).

191. “‘Selected dairy products’ means ‘milk’ for human consumption in fluid form, ‘fluid milk products’ as defined in section 32.391, ‘frozen foods’ as defined in section 32.55, subdivision 2, cottage cheese, and ‘mix’ and ‘ice cream mix’ as defined in section 32.55, subdivision 4, including ice milk mix.” *Id.* § 32A.03(2).

uct together with another commodity or service that is less than the aggregate of the price of the two when sold separately.<sup>192</sup> Selected dairy products, another provision makes clear, are also subject to the section 325.04 prohibitions.<sup>193</sup> Manufacturers, distributors, and wholesalers also are prohibited from selling furniture or trade fixtures to retailers at less than cost.<sup>194</sup> Sales of these items at less than fifteen percent above invoice or replacement cost are deemed *prima facie* evidence of a sale below cost.<sup>195</sup>

In addition to these relatively recent prohibitions relating to the sale of selected dairy products, statutes dealing with discrimination in the purchase of milk and farm products have been in effect for over half a century.<sup>196</sup> In 1909, the Minnesota Legislature prohibited unlawful discrimination in the purchase of milk, cream, and butterfat.<sup>197</sup> The legislation was revised in 1921<sup>198</sup> to prohibit buying milk, cream, or butterfat at a higher price in one locality than in another locality for the same commodity by the same person, if done for the purpose of creating a monopoly, restraining trade, limiting competition, or destroying the business of a competitor.<sup>199</sup> Proof that a higher price was paid in one locality than in another, after due allowance for the cost of trans-

192. See *id.* § 32A.04(1)(m) (also prohibiting "any method or device" intending to circumvent the stated policy of the Dairy Industry Unfair Trade Practices Act).

193. See *id.* § 32A.04(1)(o).

194. *Id.* § 32A.07(a). The Act also prohibits giving, lending, furnishing, or leasing furniture or trade fixtures as an incentive or inducement to handle certain dairy products. *Id.* § 32A.04(1)(c).

195. *Id.* § 32A.07(a). Query the rationale for, in effect, requiring that sales by dairy wholesalers be at least 15% above cost even though other wholesalers under the Act Against Unfair Discrimination and Competition are required to sell at only 2% above cost. See notes 152-53 *supra* and accompanying text.

196. See Act of Apr. 15, 1921, ch. 305, 1921 Minn. Laws 373 (current version at MINN. STAT. §§ 32.11-.12 (1976)); Act of Apr. 23, 1909, ch. 468, 1909 Minn. Laws 564 (repealed 1921).

197. See Act of Apr. 23, 1909, ch. 468, 1909 Minn. Laws 564 (repealed 1921). The statute came under attack on constitutional grounds in *State v. Bridgeman & Russell Co.*, 117 Minn. 186, 134 N.W. 496 (1912), discussed in notes 279-84 *infra* and accompanying text. The defendant argued that the statute violated the equal protection clause of the fourteenth amendment of the United States Constitution, as well as the equality clause of article 1, section 2, and the prohibition against special legislation, article 4, sections 33-34 of the Minnesota Constitution. The court upheld the statute as related to the legitimate purpose of preventing monopoly, 117 Minn. at 191, 134 N.W. at 497-98, and as not being an arbitrary or fanciful classification since it limited its scope to those *intending* to create a monopoly or destroy competition. 117 Minn. at 189, 134 N.W. at 497.

198. The 1921 Act expressly repealed the 1909 law, but reenacted the prohibition with similar language. See Act of Apr. 15, 1921, ch. 305, 1921 Minn. Laws 373 (current version at MINN. STAT. §§ 32.11-.12 (1976)).

199. See *id.*

portation, constituted prima facie evidence of a violation.<sup>200</sup> A meeting competition defense also was provided.<sup>201</sup>

A 1923 amendment limited the statute's application to persons engaged in the business of buying such products "for manufacture or for sale" and eliminated the requirement of an anticompetitive purpose.<sup>202</sup> The prohibition against discriminating between different localities was expanded in 1955 to include discrimination practiced "in the same locality."<sup>203</sup>

Discrimination in the purchase of farm products was addressed by the 1927 Minnesota Legislature.<sup>204</sup> The legislation, duplicating the coverage of dairy products, also reached the purchase of "honey, eggs, poultry, and all livestock and products of livestock such as wool, mohair, hides, and meats."<sup>205</sup>

As was the case with the 1923 amendments dealing with discrimination in the purchase of milk products,<sup>206</sup> the 1927 legislation prohibiting discrimination in the purchase of farm products does not require any anticompetitive purpose or effect for a violation.<sup>207</sup> Furthermore, proof of payment of a higher price in one section or community than was paid in another, after due allowance for cost of transportation, was also prima facie evidence of a violation.<sup>208</sup> Discriminatory purchase prices were permitted if paid in good faith to meet competition.<sup>209</sup> In 1937 further similari-

200. *Id.* § 2, 1921 Minn. Laws 374 (current version at MINN. STAT. § 32.12(1) (1976)).

201. *See* Act of Apr. 25, 1955, ch. 876, § 2, 1955 Minn. Laws 1539 (current version at MINN. STAT. § 32.12(3) (1976)).

202. *See* Act of Mar. 31, 1923, ch. 120, § 1, 1923 Minn. Laws 120 (current version at MINN. STAT. § 32.11 (1976)). The absence of an intent requirement proved to be troublesome when the constitutionality of the statute was attacked. *See* notes 295-96 *infra* and accompanying text.

203. Act of Apr. 25, 1955, ch. 876, § 1, 1955 Minn. Laws 1538 (current version at MINN. STAT. § 32.11 (1976)).

204. Act of Apr. 19, 1927, ch. 252, 1927 Minn. Laws 374 (current version at MINN. STAT. §§ 17.14-.19 (1976)).

205. *Id.* § 2(b), 1927 Minn. Laws 374 (current version at MINN. STAT. § 17.14(3) (1976)).

206. *See* note 202 *supra* and accompanying text.

207. *See* Act of Apr. 19, 1927, ch. 252, § 3, 1927 Minn. Laws 374 (current version at MINN. STAT. § 17.15 (1976)). The Minnesota Supreme Court upheld the statute against due process attack even though the statute omitted the element of intent. *See* *State v. Lanesboro Produce & Hatchery Co.*, 221 Minn. 246, 263, 21 N.W.2d 792, 799-800 (1946). In a later decision, the court appeared to interpret *Lanesboro* as not addressing the issue of intent. *See* *Twin City Candy & Tobacco Co. v. A. Weisman Co.*, 276 Minn. 225, 234, 149 N.W.2d 698, 704 (1967) (invalidating prior version of Unfair Cigarette Sales Act due to absence of requirement of intent or effect).

208. Act of Apr. 19, 1927, ch. 252, § 4, 1927 Minn. Laws 375 (current version at MINN. STAT. § 17.16 (1976)).

209. *Id.* § 3, 1927 Minn. Laws 374 (current version at MINN. STAT. § 17.15 (1976)).

ties between the two statutes resulted when the farm products statute was amended to reach discrimination "between persons in the same community."<sup>210</sup> The 1937 amendment also made unlawful the failure "to deduct full transportation costs from the purchase price paid, or . . . to deduct the actual cost of hauling when such products are gathered by wagon or truck."<sup>211</sup> When the requirement of deducting actual transportation costs was found unconstitutional,<sup>212</sup> the Legislature amended the statute to require the deduction of "reasonable" transportation costs.<sup>213</sup>

### 3. Cigarettes

In 1961, the Minnesota Legislature passed an act proscribing sales of cigarettes below cost.<sup>214</sup> Six years later, in 1967,<sup>215</sup> the Legislature considered the prohibition again after the Minnesota Supreme Court found the initial legislation unconstitutional.<sup>216</sup> The current act, entitled the Unfair Cigarette Sales Act,<sup>217</sup> prohibits wholesalers or retailers from selling cigarettes at less than cost when such sales are made for the purpose or with the effect of injuring a competitor or destroying competition.<sup>218</sup> Unless made in the ordinary course of business, the sale of cigarettes along with any other item at a combined price also is prohibited if the combined price is below the cost of all articles included in the transaction.<sup>219</sup> Excluded from the prohibitions in the Act are isolated

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210. Act of Apr. 24, 1937, ch. 420, § 2, 1937 Minn. Laws 611 (current version at MINN. STAT. § 17.15 (1976)).

211. *Id.*

212. See *State v. Northwest Poultry & Egg Co.*, 203 Minn. 438, 443-44, 281 N.W. 753, 755-56 (1938) (due process denied when the ability to ascertain costs with reasonable certainty was not present).

213. See Act of Mar. 23, 1945, ch. 122, 1945 Minn. Laws 180 (current version at MINN. STAT. § 17.15 (1976)).

214. See Act of May 25, 1961, ch. 35, 1961 Minn. Laws 1540 (repealed 1967).

215. See Act of May 19, 1967, ch. 600, 1967 Minn. Laws 1202 (current version at MINN. STAT. §§ 325.64-.76 (1976), as amended by Act of Apr. 5, 1978, ch. 793, §§ 72, 98, 1978 Minn. Laws 1210, 1217).

216. See *Twin City Candy & Tobacco Co. v. A. Weisman Co.*, 276 Minn. 225, 234, 149 N.W.2d 698, 704 (1967), discussed in notes 353-61 *infra* and accompanying text.

217. MINN. STAT. §§ 325.64-.76 (1976), as amended by Act of Apr. 5, 1978, ch. 793, §§ 72, 98, 1978 Minn. Laws 1210, 1217. Section 72 of the 1978 law deleted "the chairman of the commerce commission" from the group of persons permitted to bring actions against violators for injunctive relief or damages. Section 98 of the 1978 law repealed certain provisions that granted powers and duties to the chairman of the commerce commission to promulgate regulations and conduct hearings and cost surveys for purposes of enforcing the Act.

218. MINN. STAT. § 325.67(1) (1976).

219. *Id.* § 325.68.

transactions, clearance sales, sales of damaged cigarettes,<sup>220</sup> and sales to meet competition.<sup>221</sup>

Also set forth in the statute are certain rebuttable presumptions as to the cost of doing business for the purpose of establishing a seller's "cost." Generally, it is presumed that wholesalers have a cost of doing business equal to four percent of the basic cost of the cigarettes<sup>222</sup> and that retailers have a cost of doing business equal to eight percent of the basic cost of the cigarettes.<sup>223</sup>

#### 4. Beer

In 1977, apparently inspired by the vicissitudes of a local brewery and its distributors,<sup>224</sup> the Legislature enacted far-reaching provisions relating to beer brewers and wholesalers.<sup>225</sup> In addition to dealing generally with relations between brewers and beer wholesalers, the Legislature, with utmost simplicity, enacted the following prohibition: "No brewer shall discriminate among its wholesalers in any business dealings including, but not limited to, the price of beer sold to the wholesaler, unless the classification among its wholesalers is based upon reasonable grounds."<sup>226</sup>

#### 5. Liquor

Four years before the "beer statute" was passed, the Minnesota Legislature had enacted similar provisions requiring uniformity in the pricing of intoxicating liquor.<sup>227</sup> This liquor act provides that every licensed importer shall offer intoxicating liquor brought into Minnesota to all licensed wholesalers and manufac-

220. *See id.* § 325.70.

221. *See id.* § 325.71. The statute does not include a requirement that the competitor's price be "legal." *See id.*

222. *See id.* § 325.66, subd. 10(2). The presumption is 2% when a wholesaler sells to another wholesaler. *See id.*

223. *See id.* § 325.66, subd. 11(2).

224. *See Tape of Hearing on H.F. 1132 Before the Minnesota House of Representatives (Committee on Commerce & Economic Development, 70th Minn. Legis., 1st Sess. (May 3, 1977). S.F. 1070 was later substituted for H.F. 1132. See 2 MINN. H.R. JOUR. 2146 (1977). While the original version would have added the beer industry to Minnesota's franchise statute, the House of Representatives amended the bill to exclude this incorporation. See id. at 2708. The Senate concurred in this amendment and the bill took its final form. See 2 MINN. S. JOUR. 2423 (1977).*

225. *See Act of May 27, 1977, ch. 328, 1977 Minn. Laws 668 (codified at MINN. STAT. §§ 325B.01-.17 (Supp. 1977)).*

226. MINN. STAT. § 325B.12 (Supp. 1977).

227. *See Act of May 24, 1973, ch. 664, § 2, 1973 Minn. Laws 1753 (codified at MINN. STAT. § 340.114 (1976)).*



turers "on an equal basis."<sup>228</sup> The statute declares a number of practices illegal, including:

- (1) sales to any wholesaler or manufacturer at different prices than those offered to other wholesalers or manufacturers, exclusive of transportation costs,<sup>229</sup>
- (2) sales to any wholesaler or manufacturer on terms of purchase different from those offered others unless the customer will be unable to comply with existing credit terms.<sup>230</sup>

Furthermore, the statute reaches geographic discrimination between sales in Minnesota and sales in other states. Importers or manufacturers are prohibited from selling intoxicating liquor to any licensed wholesaler in Minnesota at a price higher than the lowest price charged for the same item in any other state.<sup>231</sup> Due allowance may be made for differences in state taxes and the actual cost of delivery.<sup>232</sup> However, the statute does not apply to nonintoxicating liquors, wines, or malt beverages regardless of alcoholic content.<sup>233</sup>

## 6. Prescription Drugs

In 1973, the Minnesota Legislature determined that the general statutory prohibitions dealing with price discrimination were inadequate to deal with problems believed to exist in the distribution of pharmaceutical products.<sup>234</sup> The Legislature required all wholesalers or manufacturers of prescription drugs to sell their products at the same price to different purchasers,<sup>235</sup> with due

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228. MINN. STAT. § 340.114(1) (1976).

229. *Id.* § 340.114(2)(b). Quantity discounts based upon actual cost savings may be uniformly offered to all wholesalers and manufacturers without being subject to the prohibition. *See id.*

230. *Id.* § 340.114(2)(c).

231. *Id.* § 340.114(3), para. 1.

232. *See id.* § 340.114(3), para. 2 (determination of lowest sale price in any other state also takes into consideration appropriate reductions to reflect discounts, rebates, and other inducements given to any wholesaler, state, or state agency purchasing such item in such other state).

233. *Id.* § 340.114(4). This provision does not render the statute unconstitutional under equal-protection guarantees. *See Federal Distillers, Inc. v. State*, 304 Minn. 28, 43-44, 229 N.W.2d 144, 156, *appeal dismissed sub nom. Heaven Hill Distilleries, Inc. v. Novak*, 423 U.S. 908 (1975). Nonintoxicating malt liquor, defined in MINN. STAT. § 340.001(2) (1976) as containing no more than 3.2% alcohol by weight, appears to be covered in the beer statute. *See notes 224-26 supra* and accompanying text.

234. *See Act of May 24, 1973*, ch. 722, 1973 Minn. Laws 2075 (codified at MINN. STAT. § 151.061(1) (1976)).

235. MINN. STAT. § 151.061(1) (1976).

allowance for differences in grade, quality, quantity, and freight costs.<sup>236</sup> However, quantity discounts are considered to be unfair discrimination unless "reasonably based on actual cost savings to all like purchasers."<sup>237</sup> An exception is made for sales to public and charitable institutions.<sup>238</sup>

## 7. Summary

The various Minnesota laws dealing with price discrimination in the sale or purchase of specific products differ substantially from statute to statute. When considered with reference to the Act Against Unfair Discrimination and Competition,<sup>239</sup> the statutes relating to specific products result in a substantial collection of possibly irreconcilable regulations. The statutes relating to the sale of beer, intoxicating liquor, and pharmaceuticals require almost absolute price uniformity and apparently do not permit price differences based on meeting competition.<sup>240</sup> They seem aimed at preventing injury at the secondary level—competition among purchasers of those products.<sup>241</sup> However, these statutes—as well as the statutes pertaining to discrimination in the purchase of farm products<sup>242</sup>—require no purpose or effect to injure competition before a violation is present;<sup>243</sup> nor do they apply to sales below cost.<sup>244</sup> Perhaps these statutes represent a legislative determination that all price differences as to these products injure competition.

On the other hand, the Unfair Cigarette Sales Act is directed solely toward sales below cost and combination sales.<sup>245</sup> By contrast, the prohibition relating to sale of petroleum products, like the general prohibitions of price discrimination,<sup>246</sup> is concerned with locality discrimination and primary rather than secondary level injury.<sup>247</sup> In any event, there is no obvious rationale for the

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236. *Id.* This section also provides for an action for damages, reasonable attorney's fees, and equitable relief. See *id.* § 151.061(2).

237. *Id.* § 151.061(1).

238. See *id.*

239. See *id.* §§ 325.02-.075; notes 16-164 *supra* and accompanying text.

240. See notes 224-38 *supra* and accompanying text.

241. See *id.*

242. See MINN. STAT. §§ 17.15, 32.11, 32A.04(o) (1976); notes 204-05 *supra* and accompanying text.

243. See notes 204-05, 226, 229-30, 234-38 *supra* and accompanying text.

244. See *id.*

245. See MINN. STAT. §§ 325.64-.76 (1976), as amended by Act of Apr. 5, 1978, ch. 793, §§ 72, 98, 1978 Minn. Laws 1210, 1217; notes 217-23 *supra* and accompanying text.

246. See notes 16-164 *supra* and accompanying text.

247. See notes 172-84 *supra* and accompanying text.

differing approaches of the various statutes or for singling out certain products for special treatment.

### C. Penalties

Despite possible incongruities in the various Minnesota statutes prohibiting price discrimination and sales below cost, violations can result in the imposition of substantial penalties. Willful violation of the general locality discrimination and sales-below-cost statutes is a misdemeanor<sup>248</sup> and each separate discriminatory sale is a separate offense.<sup>249</sup> More significantly, any person damaged or threatened by loss or injury by reason of a violation of the general act may sue for injunctive relief, as well as actual damages.<sup>250</sup> To obtain injunctive relief, it is unnecessary to allege or prove the absence of an adequate remedy at law.<sup>251</sup> Additional remedies are provided in section 325.907,<sup>252</sup> which permits the injured person to recover damages and costs, including investigative costs and attorney's fees.<sup>253</sup>

The Attorney General is expressly authorized to investigate violations of the law,<sup>254</sup> obtain discovery without initiating a civil action, and to arrest and seek prosecution of persons violating price discrimination prohibitions.<sup>255</sup> In addition, the Attorney General may sue for injunctive relief against any actual or threatened violation while preserving all other penalties provided by law.<sup>256</sup> Finally, the Attorney General may sue for a civil penalty, not in excess of \$25,000, against any person found to have violated the general locality discrimination and sales-below-cost statutes.<sup>257</sup>

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248. MINN. STAT. § 325.48, subd. 2(1), para. 1 (1976). See generally *id.* § 609.02(3) (Supp. 1977) (misdemeanors are punishable by a sentence of not more than 90 days or a fine of \$500 or both).

249. See *id.* § 645.24 (1976) (each violation of any act prohibited by a statute constitutes separate offense).

250. *Id.* § 325.49, para. 1.

251. *Id.*

252. See *id.* § 325.907(3a).

253. *Id.*

254. *Id.* § 325.907(1).

255. *Id.* § 325.907(2).

256. *Id.* § 325.907(3).

257. *Id.* These remedies also should be compared with those applicable to violation of the basic Minnesota antitrust statute. See Minnesota Antitrust Law of 1971, ch. 865, 1971 Minn. Laws 1715 (current version at MINN. STAT. §§ 325.8011-.8028 (1976 & Supp. 1977)). Violation of the restraint of trade and commerce section of the Antitrust Act is a felony punishable by a \$50,000 fine or imprisonment for five years or both. MINN. STAT. § 325.8018(2) (1976). Further, any persons injured by a violation are entitled to treble

A variety of remedies also are available for violations of the price discrimination or sales-below-cost statutes relating to particular commodities. Violation of the act relating to beer wholesalers and brewers allows the wholesaler discriminated against to seek injunctive relief.<sup>258</sup> However, express authorization for recovery of damages is not afforded.<sup>259</sup> Any person injured by unfair price discrimination in the sale of prescription drugs may recover both equitable relief and damages.<sup>260</sup> The sale of cigarettes at less than cost is a misdemeanor<sup>261</sup> and any person injured is entitled to injunctive relief and damages.<sup>262</sup> Discrimination in the purchase of dairy products is a misdemeanor.<sup>263</sup> Violations of the general prohibition against discrimination in the purchase of farm products can result in a fine of at least fifty dollars for each offense, or in default of payment of the fine, by imprisonment for not less than three months nor more than one year.<sup>264</sup> Locality discrimination in the sale of petroleum products apparently is a more serious offense. Violation is a gross misdemeanor, punishable by a fine of not more than \$5,000, or imprisonment not exceeding one year, or both.<sup>265</sup>

### III. COURT INTERPRETATION OF THE MINNESOTA STATUTES

In their day, various Minnesota statutes dealing with price discrimination and sales below cost have been the subject of leading decisions not only by the Minnesota Supreme Court<sup>266</sup> but also by federal courts,<sup>267</sup> including the United States Supreme Court.<sup>268</sup> Unfortunately, few of the significant decisions interpret

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damages as well as apparently being entitled to seek injunctive relief. *See id.* §§ 325.8018-.8020.

258. MINN. STAT. § 325B.08 (Supp. 1977).

259. *See id.* Section 325B.08 does allow the recovery of punitive and actual damages, with attorney's fees, when provisions other than the price discrimination prohibition are violated.

260. *See id.* § 151.061(2) (1976).

261. *Id.* § 325.67(1).

262. *Id.* § 325.74(1).

263. *Id.* § 32.11.

264. *Id.* § 17.181.

265. *Id.* § 325.82(2).

266. *See, e.g., State v. Lanesboro Produce & Hatchery Co.*, 221 Minn. 246, 21 N.W.2d 792 (1946), noted in 32 IOWA L. REV. 125 (1946), discussed in notes 338-48 *infra* and accompanying text; *State v. Northwest Poultry & Egg Co.*, 203 Minn. 438, 281 N.W. 753 (1938), discussed in notes 297-300 *infra* and accompanying text.

267. *See, e.g., Great Atl. & Pac. Tea Co. v. Ervin*, 23 F. Supp. 70 (D. Minn. 1938) (*per curiam*), discussed in notes 301-21 *infra* and accompanying text.

268. *See Fairmont Creamery Co. v. Minnesota*, 274 U.S. 1 (1927), discussed in notes 295-96 *infra* and accompanying text.

the legislation or consider any of the anomalies or incongruities referred to above. Rather, the decisions have dealt with the constitutionality of the statutes with considerable reference to vagueness<sup>269</sup> and to the state of mind required of an alleged violator.<sup>270</sup> Generally, the Minnesota Supreme Court has been inclined to find the statutes constitutional,<sup>271</sup> whereas the federal courts have tended to find the statutes unconstitutional.<sup>272</sup> While primarily of historical interest, these decisions will be reviewed not only because they afford some insight into constitutionality and construction, but also because they explain why various statutes were enacted or amended at particular times and in particular forms. Rather than reviewing the cases separately as they construe particular statutes, the constitutional and then the interpretative cases will be discussed chronologically because the decisions are interrelated; a decision interpreting one of the statutes is often relied upon as precedent in subsequent cases interpreting different statutes.

### A. Constitutional Cases

The first reported decision concerning a Minnesota price discrimination statute is *State ex rel. Young v. Standard Oil Co.*,<sup>273</sup> in which the Attorney General had sued to enforce<sup>274</sup> the 1907 act

269. See, e.g., *Great Atl. & Pac. Tea Co. v. Ervin*, 23 F. Supp. 70, 83 (D. Minn. 1938) (per curiam) (finding challenged statute vague in part); *McElhone v. Geror*, 207 Minn. 580, 589, 292 N.W. 414, 419 (1940) (finding challenged statute "definite and certain"). See generally Thatcher, *The Constitutionality of the Unfair Practices Acts*, 30 MINN. L. REV. 559 (1946).

270. See, e.g., *State v. Wolkoff*, 250 Minn. 504, 514-15, 85 N.W.2d 401, 408-09 (1957); *McElhone v. Geror*, 207 Minn. 580, 585-86, 292 N.W. 414, 417-18 (1940). See generally Thatcher, *supra* note 269.

271. See, e.g., *State v. Lanesboro Produce & Egg Co.*, 221 Minn. 246, 21 N.W.2d 792 (1946); *State v. Bridgeman & Russell Co.*, 117 Minn. 186, 134 N.W. 496 (1912). But see *Twin City Candy & Tobacco Co. v. A. Weisman Co.*, 276 Minn. 225, 149 N.W.2d 698 (1967).

272. See *Fairmont Creamery Co. v. Minnesota*, 274 U.S. 1 (1927); *Great Atl. & Pac. Tea Co. v. Ervin*, 23 F. Supp. 70 (D. Minn. 1938) (per curiam).

273. 111 Minn. 85, 126 N.W. 527 (1910).

274. A collateral issue in *Young* was whether the Attorney General had proceeded properly in his enforcement of the Act. Under the Act, a violation was to be remedied by revocation of a foreign corporation's license to do business in Minnesota by the Secretary of State. The Secretary had not acted prior to the commencement of the lawsuit in *Young*. Defendant Standard Oil argued that the Attorney General's action was premature because the Act permitted the Attorney General to bring suit only after revocation of the license and only if the discriminatory practice continued. The court dismissed this argument, noting: "The constitution and laws of this state have vested in the attorney general original discretion which he may exercise in instituting proper judicial proceedings to

prohibiting locality price discrimination in the sale of petroleum products.<sup>275</sup> The Minnesota Supreme Court upheld the constitutionality of the statute against an equal protection challenge,<sup>276</sup> referring to cases finding statutes regulating such specific products as baking powder, agricultural goods, and dairy products constitutional.<sup>277</sup> The court observed:

Petroleum is taken from the earth in a manner peculiar to itself. The refined oil is handled as no other product. Its production and distribution have caused more legislative investigations, and been the subject of greater legal combats, in recent years, than any other article of commerce. We think it is more unique, and justifies special regulation much more, than many of the other articles as to which legislation was sustained in the cases above cited.<sup>278</sup>

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secure the enforcement of law." *Id.* at 94, 126 N.W. at 528. The court regarded the enforcement provision of the Act as a nonexclusive procedure by which to obtain enforcement of the Act. *See id.* at 93-94, 126 N.W. at 528.

275. *See* Act of Apr. 20, 1907, ch. 269, 1907 Minn. Laws 363. Since its enactment in 1907, the statute prohibiting price discrimination in the sale of petroleum has not been significantly altered. *Compare id. with* MINN. STAT. § 325.82 (1976).

276. 111 Minn. at 100-02, 126 N.W. at 531-32; *cf.* *State v. Fairmont Creamery Co.*, 153 Iowa 702, 709-12, 133 N.W. 895, 898-900 (1911) (statute prohibiting price discrimination in purchase of agricultural commodities upheld under equal protection analysis). Justice Lewis, dissenting in the *Young* case, asserted that the classification made by the Act was invalid because it did not include all items that naturally fell within its scope. 111 Minn. at 103, 126 N.W. at 532 (Lewis, J., dissenting).

Equal protection challenges to price discrimination statutes in other states have sometimes been successful. *See, e.g., State v. Consumer Warehouse Mkt., Inc.*, 185 Kan. 363, 371-72, 343 P.2d 234, 240-41 (1959) (general statute that exempted grain and feed dealers violative of equal protection); *San Antonio Retail Grocers, Inc. v. Lafferty*, 156 Tex. 574, 578-79, 297 S.W.2d 813, 816-17 (1957) (statute that prohibited grocery stores from selling below cost violative of fourteenth amendment because of absence of reasonable basis for classification).

277. 111 Minn. at 96-98, 126 N.W. at 530. The *Young* court referred to, among others: *State v. Sherod*, 80 Minn. 446, 83 N.W. 417 (1900) (baking powder); *State ex rel. Beek v. Wagener*, 77 Minn. 483, 80 N.W. 633 (1899) (*per curiam*) (upholding conviction of defendant who violated provisions of act governing conduct of agricultural-products brokers); *State ex rel. Weideman v. Horgan*, 55 Minn. 183, 56 N.W. 688 (1893) (imitation butter); *Stolz v. Thompson*, 44 Minn. 271, 46 N.W. 410 (1890) (baking powder); *Butler v. Chambers*, 36 Minn. 69, 30 N.W. 308 (1886) (dairy products). The *Young* court also made reference to federal cases that "fully sustain[ed] the foregoing Minnesota cases," 111 Minn. at 98, 126 N.W. at 530, citing *Heath & Milligan Mfg. Co. v. Worst*, 207 U.S. 338 (1907) (sales of mixed paints); *Ozan Lumber Co. v. Union County Nat'l Bank*, 207 U.S. 251 (1907) (statute regulating transfers of patent rights); *Otis v. Parker*, 187 U.S. 606 (1903) (provision of state constitution regulating sales of corporate stock upheld); *Plumley v. Massachusetts*, 155 U.S. 461 (1894) (statute preventing deception in sale of imitation butter not violative of commerce clause; *Horgan* and *Butler* cited in opinion).

278. 111 Minn. at 99, 126 N.W. at 531 (referring to, among others, cases cited in note 277 *supra*).

In *State v. Bridgeman & Russell Co.*,<sup>279</sup> the defendant had been charged with violation of the 1909 statute prohibiting discrimination in the purchase of dairy products.<sup>280</sup> The Minnesota Supreme Court, relying on *Young*, again found no equal protection violation;<sup>281</sup> the distinction between manufacturers subject to the statute and others not subject to the statute<sup>282</sup> was reasonable because manufacturers purchased farm products in much greater volume than did individual consumers.<sup>283</sup> The potential for abuse and injury to competition was much greater in the case of manufacturers than in the case of consumers.<sup>284</sup>

Thirteen years later, in *State v. Fairmont Creamery*,<sup>285</sup> another company was convicted of violating the statute prohibiting price

279. 117 Minn. 186, 134 N.W. 496 (1912).

280. See Act of Apr. 23, 1909, ch. 468, 1909 Minn. Laws 564 (current version at MINN. STAT. §§ 32.11-.12 (1976)). For a history of the dairy products price discrimination statute between 1909 and 1923, see notes 197-203 *supra* and accompanying text.

281. See 117 Minn. at 188-91, 134 N.W. at 497-98.

282. By its terms, the Act applied solely to those who purchased milk, cream, or butter fat for the purpose of manufacture; "by necessary implication," the court observed, the Act "exclude[d] those engaged in the business of buying such commodities for any purpose other than for manufacture." *Id.* at 189, 134 N.W. at 497. This exclusion presumably included purchasers for home consumption.

283. The court apparently took judicial notice of the nature of the dairy manufacturing business, see *id.* at 188-89, 134 N.W. at 497, and concluded:

Our consideration of the subject has led us to the conclusion that the business of buying milk, cream, and butter fat for the purpose of manufacture, when carried on by parties controlling ample capital, with large central plants and local purchasing points extending over wide territory, affords special facilities and motives for the creation of monopolies by the temporary maintenance of artificial prices at competitive local points, and, further, that there is in this respect a substantial distinction between the purchase of milk, cream, and butter fat for manufacture and their purchase for resale or consumption. The business of buying such commodities for resale or consumption is not one easily susceptible to monopolistic control.

*Id.* at 190, 134 N.W. at 497.

The court cited *State v. Fairmont Creamery Co.*, 153 Iowa 702, 133 N.W. 895 (1911), which, upon substantially the same facts, upheld the Iowa statute prohibiting discrimination in prices of dairy and poultry products purchased at different points in the state. The Iowa court also recognized the dangers of monopolistic controls in the purchase and manufacture of dairy products, see *id.* at 709-11, 133 N.W. at 898-99, and found a legitimate state purpose in the promotion of competition within the dairy manufacturing industry.

284. 117 Minn. at 189-90, 134 N.W. at 497; see note 283 *supra*.

285. 162 Minn. 146, 202 N.W. 714 (1925), *aff'd*, 168 Minn. 378, 210 N.W. 163 (1926), *rev'd*, 274 U.S. 1 (1927). The Minnesota Supreme Court considered the statute a third time in another appeal involving the same parties but a different violation in *State v. Fairmont Creamery Co.*, 168 Minn. 381, 210 N.W. 608 (1926) (*per curiam*). In this third consideration of the statute, the Minnesota court summarily affirmed the conviction on the strength of the prior two decisions.

discrimination by a manufacturer purchasing dairy products.<sup>286</sup> Between the *Bridgeman & Russell* and *Fairmont Creamery* decisions, the Legislature had rewritten the dairy product price discrimination statute,<sup>287</sup> removing the element of intent to injure or destroy competition from the statutory violation.<sup>288</sup> This proved to be a fatal mistake when the *Fairmont Creamery* case ended in the United States Supreme Court,<sup>289</sup> becoming for its time a landmark decision in price discrimination law. The initial Minnesota Supreme Court decision had upheld the constitutionality of the statute against challenges on several bases.<sup>290</sup> The case came

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286. The statute involved in the *Fairmont Creamery* cases was similar in most respects to the one construed in *Bridgeman & Russell*. Compare Act of Apr. 23, 1909, ch. 468, 1909 Minn. Laws 564 (repealed 1921) with Act of Apr. 15, 1921, ch. 305, 1921 Minn. Laws 373, as amended by Act of Mar. 31, 1923, ch. 120, 1923 Minn. Laws 120. However, when the Legislature re-enacted the dairy product discrimination law, it failed to retain any element of intent. This failure would become the downfall of the statute. See *Fairmont Creamery Co. v. Minnesota*, 274 U.S. 1, 8-11 (1927); notes 295-96 *infra* and accompanying text.

287. In 1921, the specific statute that had been upheld in the *Bridgeman & Russell* decision was expressly repealed. See Act of Apr. 15, 1921, ch. 305, § 4, 1921 Minn. Laws 374. Prior to 1921, the Legislature had amended the *Bridgeman & Russell* statute twice, first in 1913 to empower the state dairy and food commissioner to enforce the statute, see Act of Apr. 9, 1913, ch. 230, § 2, 1913 Minn. Laws 286, and again in 1917 to add a description of a prima facie violation. See Act of Apr. 17, 1917, ch. 337, 1917 Minn. Laws 473. The 1921 act repealing the *Bridgeman & Russell* statute also encompassed the repeal of these two amendments. See Act of Apr. 15, 1921, ch. 305, § 4, 1921 Minn. Laws 374. In addition, this 1921 act adopted a new version of the dairy products price discrimination law. See *id.* §§ 1-3, 1921 Minn. Laws 373. Two years later, this new version was amended by Act of Mar. 31, 1923, ch. 120, 1923 Minn. Laws 120. It was this 1923 amendment to the 1921 law that was at issue in *Fairmont Creamery*.

288. Compare Act of Apr. 15, 1921, ch. 305, § 1, 1921 Minn. Laws 373, as amended by Act of Mar. 31, 1923, ch. 120, 1923 Minn. Laws 120 (*Fairmont Creamery* statute) with Act of Apr. 23, 1909, ch. 468, 1909 Minn. Laws 564 (*Bridgeman & Russell* statute).

289. See *Fairmont Creamery Co. v. Minnesota*, 274 U.S. 1, 8-11 (1927).

290. The court was presented with certified questions pertaining to the proper venue of the case, the constitutionality of the statute under the commerce clause of the federal constitution, and the constitutionality of the statute under the equal protection and freedom of contract clauses of the state and federal constitutions. See 162 Minn. at 147, 202 N.W. at 715.

Against the defendant's contention that venue would be proper only in the county where the higher price had been obtained, the court reasoned that, because the violation requires two sales at different prices and the Legislature could have made purchasing at the lower price the crime, venue could properly be laid in either the county where the higher price was obtained or where the lower price was obtained. See *id.* at 148, 202 N.W. at 715. Equally short treatment was afforded the contention that the statute violated the commerce clause of the federal constitution. The court held that merely because the product purchased in Minnesota wound up in the hands of an Iowa manufacturer did not invalidate the proper exercise of the Minnesota Legislature's police power. See *id.* at 158, 202 N.W. at 719.

The equal protection challenge was resolved in favor of the statute on the strength of,



before the Minnesota Supreme Court a second time on an appeal from an order denying a new trial after the defendant had been convicted.<sup>291</sup> The defendant argued that the revised statute prohibiting price discrimination in the purchase of dairy products was unconstitutional because it no longer required intent to injure or destroy a competitor.<sup>292</sup> This argument was rejected—omission of this element was not an arbitrary act by the Legislature.<sup>293</sup>

After the Minnesota Supreme Court on several occasions had upheld the constitutionality of Minnesota price discrimination statutes,<sup>294</sup> the United States Supreme Court entered the picture. In the *Fairmont Creamery* case,<sup>295</sup> the United States Supreme Court held that the statute unconstitutionally interfered with the defendant's right to contract:

We think the inhibition of the statute has no reasonable relation to the anticipated evil—high bidding by some with purpose to monopolize or destroy competition. Looking through form to substance, it clearly and unmistakably infringes private rights whose exercise does not ordinarily produce evil consequences, but the reverse.<sup>296</sup>

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*inter alia*, the *Young and Bridgeman & Russell* decisions. See *id.* at 148-51, 202 N.W. at 715-16. However, in resolving whether the statute offended the freedom of contract clauses, the court looked to the effect of the statute to determine whether the statute unreasonably interfered with this freedom. See *id.* at 152, 202 N.W. at 717. Finding the "evil" that the Legislature sought to eradicate was a legitimate objective for the exercise of the police power, the court found no violation of the contract clause. See *id.* at 155-58, 202 N.W. at 718-19.

291. 168 Minn. 378, 210 N.W. 163 (1926), *rev'd*, 274 U.S. 1 (1927).

292. See 168 Minn. at 379, 210 N.W. at 164; 162 Minn. at 148-49, 202 N.W. at 715.

293. 168 Minn. at 380, 210 N.W. at 164; 162 Minn. at 155, 202 N.W. at 718.

294. See *State v. Fairmont Creamery Co.*, 162 Minn. 146, 202 N.W. 714 (1925), *aff'd*, 168 Minn. 378, 210 N.W. 163 (1926), *rev'd*, 274 U.S. 1 (1927); *State ex rel. Young v. Standard Oil Co.*, 111 Minn. 85, 126 N.W. 527 (1910).

295. 274 U.S. 1 (1927).

296. *Id.* at 9. The issue, as the Court posed it, required an answer to this question: May the State, in order to prevent some strong buyers of cream from doing things which may tend to monopoly, inhibit plaintiff in error from carrying on its business in the usual way heretofore regarded as both moral and beneficial to the public and not shown now to be accompanied by evil results as ordinary incidents?

*Id.* The answer was obvious: "Former decisions here require a negative answer." *Id.*

The Court acknowledged that certain activities could be prohibited by a state in the exercise of its police power, but that prohibition must have a real or substantial relation to the evil sought to be proscribed. See *id.* at 11. The Minnesota statute, however, had no substantial relation to proscription of the evil:

Buyers in competitive markets must accommodate their bids to prices offered by others, and the payment of different prices at different places is the ordinary

Possibly triggered by *Fairmont Creamery*, the Minnesota Federal District Court and the Minnesota Supreme Court then embarked upon a course of holding unconstitutional price discrimination and sales-below-cost statutes. In *State v. Northwest Poultry & Egg Co.*,<sup>297</sup> the Minnesota court struck down the statute prohibiting price discrimination in the purchase of farm products.<sup>298</sup> A provision in the statute requiring a seller to deduct the "actual costs" of transportation from his price to determine whether that price was discriminatory was held unconstitutionally vague<sup>299</sup> because the provision failed to specify the factors to be considered in computing actual cost.<sup>300</sup>

In *Great Atlantic & Pacific Tea Co. v. Ervin*,<sup>301</sup> the Minnesota Federal District Court considered the constitutionality of the then recently enacted Minnesota Unfair Trade Practices Act.<sup>302</sup> The Act's definition of "cost," contained in the prohibition of locality discrimination<sup>303</sup> and modeled to some extent after the Robinson-Patman Act,<sup>304</sup> was found unconstitutional because it made no provision for selling costs.<sup>305</sup> The court remarked:

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consequent. Enforcement of the statute would amount to fixing the price at which plaintiff in error may buy, since one purchase would establish this for all points without regard to ordinary trade conditions.

*Id.* at 8-9.

297. 203 Minn. 438, 281 N.W. 753 (1938).

298. The statute involved in the case was Act of Apr. 19, 1927, ch. 252, § 3, 1927 Minn. Laws 374, as amended by Act of Apr. 24, 1937, ch. 420, § 2, 1937 Minn. Laws 611 (current version at MINN. STAT. § 17.15 (1976)). For a discussion of the current farm and dairy products statute, see notes 185-213 *supra* and accompanying text.

299. 203 Minn. at 443-44, 281 N.W. at 755-56. *But cf.* *Borden Co. v. Thomasen*, 353 S.W.2d 735, 756 (Mo. 1962) (en banc) (term "actual transportation costs" not unconstitutionally vague as "material difficulties or uncertainties" could be corrected by promulgation of rules by commissioner charged with enforcement of law).

300. See 203 Minn. at 443, 281 N.W. at 755-56 (suggesting possible items that could be considered part of "actual cost"). Justices Stone and Peterson, dissenting, asserted that "[c]ompetent accountants . . . certainly may reduce cost of transportation to something equivalent to the ton-mile or passenger-mile basis so familiar in railroad accounting." *Id.* at 445, 281 N.W. at 756 (Stone, J., dissenting). Thus, in their view, the term "actual costs" was not unconstitutionally vague or uncertain. *Id.*

The legislative response to the *Northwest Poultry* decision came in 1945 with an amendment replacing the word "actual" with the word "reasonable." See Act of Mar. 23, 1945, ch. 122, 1945 Minn. Laws 180.

301. 23 F. Supp. 70 (D. Minn. 1938) (per curiam).

302. Act of Mar. 30, 1937, ch. 116, 1937 Minn. Laws 180, as amended by Act of Apr. 26, 1937, ch. 456, 1937 Minn. Laws 709 (correcting typographical error in first act).

303. See Act of Mar. 30, 1937, ch. 116, pt. 2, 1937 Minn. Laws 181 (current version at MINN. STAT. § 325.04 (1976)).

304. Compare Robinson-Patman Act § 1(a), 15 U.S.C. § 13(a) (1976) with Act of Mar. 30, 1937, ch. 116, pt. 2, 1937 Minn. Laws 181.

305. 23 F. Supp. at 76-78. The court distinguished the Robinson-Patman Act from the

Differentials in prices justified by the differences in selling costs at different stores have not heretofore been considered as iniquitous, wrongful, or unfair, nor as having any tendency to destroy competition or to foster monopoly. In fact such price differentials have been regarded as beneficial to the public and not harmful to any one, and, even though they may affect competition, they cannot be considered as the evil which the Legislature was seeking to stamp out. The effect upon competition of differences in prices honestly based on differences in selling costs is the normal and natural result of fair competition between merchants whose overhead expenses differ. This type of competition is to be encouraged in the public interest, rather than restrained.<sup>306</sup>

Moreover, this portion of the statute did not require an intent by the seller to injure competition,<sup>307</sup> and thus, in the opinion of the court, declared some legitimate trade practices to be unfair competitive practices.<sup>308</sup>

The federal court in *Great Atlantic & Pacific Tea Co.* then turned to the provisions prohibiting sales below cost.<sup>309</sup> While

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Minnesota statute because the federal law recognized a defense for price differentials resulting from differences in selling costs, but the Minnesota statute did not. *See id.* at 78.

306. *Id.*

307. *See id.* at 76-77. The statute prohibited the sale of goods at different prices in different localities when the sale had the effect of substantially lessening competition or tending to create a monopoly. *See* Act of Mar. 30, 1937, ch. 116, pt. 2, § 2, 1937 Minn. Laws 182. Thus, as the court observed: "It is to be noted that the prohibition contained in the paragraph applies regardless of the actual intent of the merchant." 23 F. Supp. at 77.

308. The court's main objection to the statute was the prohibition against "honest price variations." 23 F. Supp. at 78. In this regard, the *Great Atlantic & Pacific Tea Co.* court struck down the statute for much the same reason that the United States Supreme Court struck down the statute in *Fairmont Creamery*. *Compare* *Fairmont Creamery Co. v. Minnesota*, 274 U.S. 1, 8 (1927) (statute inhibits, irrespective of motive, a person's "liberty to enter into normal contracts long regarded not only as essential to the freedom of trade and commerce but also as beneficial to the public") with *Great Atl. & Pac. Tea Co. v. Ervin*, 23 F. Supp. 70, 77-78 (D. Minn. 1938) (per curiam) (statute prohibits, regardless of actual intent, a person from charging same price for same item despite differences in selling costs). The statute struck down by the *Fairmont Creamery* Court, however, contained no requirement of intent to injure competition nor any requirement that the prohibited activity have an injurious effect on competition, while the statute struck down in *Great Atlantic & Pacific Tea Co.* did contain a requirement that the sale at different prices affect competition. *Compare* Act of Apr. 15, 1921, ch. 305, § 1, 1921 Minn. Laws 373, as amended by Act of Mar. 31, 1923, ch. 120, 1923 Minn. Laws 120 (*Fairmont Creamery* statute) with Act of Mar. 30, 1937, ch. 116, pt. 2, § 2, 1937 Minn. Laws 182 (*Great Atlantic & Pacific Tea Co.* statute).

309. *See* 23 F. Supp. at 78-83.

having no difficulty with the general prohibition,<sup>310</sup> the court found various definitions in the statute unconstitutional.<sup>311</sup> "Cost," defined as the manufacturer's list price for a product minus published discounts regardless of the merchant's actual cost,<sup>312</sup> was arbitrary because manufacturers often sell their products at prices other than list cost.<sup>313</sup> The definitions of "cost of doing business" and "overhead expense"—the average of all costs of doing business incurred in the calendar year immediately preceding the violation<sup>314</sup>—were unconstitutional because they failed "to give any effect whatever to a merchant's current selling costs."<sup>315</sup>

Finding other provisions also vague and immeasurable,<sup>316</sup> the court concluded that Part 2 of the Act was void in its entirety,<sup>317</sup> including provisions prohibiting locality price discrimination.<sup>318</sup> However, Part 1,<sup>319</sup> which was simply a reenactment of the 1921

310. *See id.* at 79 (by implication).

311. *See id.* at 78-79.

312. *See* Act of Mar. 30, 1937, ch. 116, pt. 2, § 3, 1937 Minn. Laws 182, as amended by Act of Apr. 26, 1937, ch. 456, 1937 Minn. Laws 709.

313. *See* 23 F. Supp. at 78-79.

314. Act of Mar. 30, 1937, ch. 116, pt. 2, § 3, 1937 Minn. Laws 182, as amended by Act of Apr. 26, 1937, ch. 456, 1937 Minn. Laws 709.

315. 23 F. Supp. at 79.

316. Specifically, the court found that the *prima facie* violation of the Act, defined as a sale at a price less than 10% above actual cost, *see* Act of Mar. 30, 1937, ch. 116, pt. 2, § 3, para. 7, 1937 Minn. Laws 182, as amended by Act of Apr. 26, 1937, ch. 456, 1937 Minn. Laws 709, raised an unconstitutional presumption of guilt. *See* 23 F. Supp. at 82. Although the court admitted that a "sale below cost" could be defined as a sale at a price less than 10% above actual cost, a merchant could not be presumed to have made such a "sale below cost" with the intent of injuring competition:

[S]uch sales have not been regarded as indicating an intent to do evil. There are many reasons, aside from a desire to injure competitors, which might induce a merchant to make profitless sales of goods. . . . A sudden necessity of paying claims of importunate creditors might furnish a reason for sales at less than cost plus overhead. Other similar illustrations are not wanting.

*Id.* at 80.

Also, the statute's use of "cost survey" in section 5 of Part 2, *see* Act of Mar. 30, 1937, ch. 116, pt. 2, § 5, 1937 Minn. Laws 184, was found to be unconstitutionally vague. 23 F. Supp. at 83.

In addition, the court found that the provision in the Act holding an officer, director, or agent of a company violating the Act criminally liable for such violation, *see* Act of Mar. 30, 1937, ch. 116, pt. 3, § 1, para. 3, 1937 Minn. Laws 184, contravened the fourteenth amendment to the federal constitution because it required no intent on the part of the officer, director, or agent in order for him to be found guilty. *See* 23 F. Supp. at 82.

317. 23 F. Supp. at 83 (inconceivable "that Legislature would have enacted part 2 without providing for its enforcement").

318. *See id.* at 83.

319. Act of Mar. 30, 1937, ch. 116, pt. 1, 1937 Minn. Laws 181 (current version at MINN. STAT. §§ 325.02-.03 (1976)).

locality price discrimination statute,<sup>320</sup> was found constitutional without discussion.<sup>321</sup>

If the 1937 Minnesota Legislature, in enacting the Unfair Trade Practices Act, had feared that Part 2 would be found unconstitutional, its fear was clairvoyant. The Legislature's concern may explain why Part 1 duplicated Part 2's prohibition of locality discrimination.<sup>322</sup> Should Part 2 be struck down, the legislation would have retained a valid prohibition of locality discrimination in Part 1.<sup>323</sup> Why two separate prohibitions of locality discrimination are now needed (assuming one prohibition is still desirable) is unknown. In any event, after *Great Atlantic & Pacific Tea Co.*, the Legislature set about in 1939 to remedy the unconstitutionality of Part 2 of the Unfair Trade Practices Act.<sup>324</sup>

The 1939 amendments to the Act<sup>325</sup> were challenged in *McElhone v. Geror*<sup>326</sup> and a companion case, *Fredricks v. Burnquist*.<sup>327</sup> In *McElhone*, the Minnesota Supreme Court noted that, historically, price regulation was permissible only when businesses were "affected with a public interest,"<sup>328</sup> but that doctrine had since been disapproved by the United States Supreme Court in *Nebbia v. New York*.<sup>329</sup> In *Nebbia*, the Court held that price control was unconstitutional only if arbitrary, discriminatory, or irrelevant to the policy the legislature is pursuing.<sup>330</sup> With this observation, the Minnesota court then considered whether

320. Compare Act of Mar. 30, 1937, ch. 116, pt. 1, 1937 Minn. Laws 181 with Act of Apr. 20, 1921, ch. 413, 1921 Minn. Laws 640 (repealed 1937).

321. See 23 F. Supp. at 83 (bare cite to *Central Lumber Co. v. South Dakota*, 226 U.S. 157 (1912) in support of holding).

322. Compare Act of Mar. 30, 1937, ch. 116, pt. 2, § 2, para. 2, 1937 Minn. Laws 182 with *id.* pt. 1, § 2, 1937 Minn. Laws 181. The present Act contains the same duplication. See notes 65-115 *supra* and accompanying text.

323. See *Great Atl. & Pac. Tea Co. v. Ervin*, 23 F. Supp. at 83 (finding Part 1 constitutional without discussion).

324. See Act of Apr. 22, 1939, ch. 403, 1939 Minn. Laws 794.

325. *Id.*

326. 207 Minn. 580, 292 N.W. 414 (1940).

327. 207 Minn. 590, 292 N.W. 420 (1940). In *Fredricks*, the plaintiffs sought to have the prohibition against sales below cost contained in Act of Apr. 22, 1939, ch. 403, § 1, 1939 Minn. Laws 794, declared unconstitutional for failure to distinguish between cash-and-carry establishments and establishments that furnish delivery service. The court found the statute constitutional because it provided a defense for sales made in good faith to meet local prices of a competitor. See 207 Minn. at 591, 292 N.W. at 420 (quoting Act of Apr. 22, 1939, ch. 403, § 3(d), 1939 Minn. Laws 797).

328. 207 Minn. at 584, 292 N.W. at 417.

329. 291 U.S. 502, 536-37 (1934). See generally Thatcher, *supra* note 269, at 561-62.

330. See 291 U.S. at 537; accord, *McElhone v. Geror*, 207 Minn. 580, 587, 292 N.W. 414, 418 (1940).

Part 2 of the Unfair Trade Practices Act<sup>331</sup> remained unconstitutional because it did not require any intent to injure competition.<sup>332</sup> The absence of this element was not considered fatal because "[s]ales below cost which have the effect of injuring competition may be prohibited regardless of intent."<sup>333</sup> The court distinguished *Fairmont Creamery* because the statute considered in that case did not require the presence or probability of competitive injury.<sup>334</sup>

Finally, the court in *McElhone* reviewed amendments that the 1939 Legislature had made to definitions relating to cost<sup>335</sup> and found that the defects identified by the Minnesota Federal District Court in *Great Atlantic & Pacific Tea Co.* had been remedied.<sup>336</sup> The prohibition against sales below cost in Part 2 of the Unfair Trade Practices Act was now constitutional.<sup>337</sup>

Several years later, in *State v. Lanesboro Produce & Hatchery Co.*,<sup>338</sup> the Minnesota Supreme Court exhibited perhaps its most liberal attitude in upholding the validity of the price discrimination statutes. The Blue Earth County Attorney had brought a criminal action against a hatchery company for violation of the

331. Act of Mar. 30, 1937, ch. 116, pt. 2, 1937 Minn. Laws 181, as amended by Act of Apr. 26, 1937, ch. 456, 1937 Minn. Laws 709, as amended by Act of Apr. 22, 1939, ch. 403, 1939 Minn. Laws 794.

332. The 1939 Legislature amended the statute to require the sale below cost to be made "for the purpose or with the effect" of injuring competition. See Act of Apr. 22, 1939, ch. 403, § 1, para. 2, 1939 Minn. Laws 795 (emphasis in original). If the prohibited activity had merely the effect of injuring competition, then it was prohibited regardless of the intention of the seller.

333. 207 Minn. at 585, 292 N.W. at 417; accord, *May's Drug Stores, Inc. v. State Tax Comm'n*, 242 Iowa 319, 331, 45 N.W.2d 245, 252 (1950) (legislature may prohibit unfair business practices without regard to state of mind of persons engaging in activity). But see *San Ann Tobacco Co. v. Hamm*, 283 Ala. 397, 402, 217 So. 2d 803, 806-07 (1968) (addition of the words "or with the effect thereof" removed the requirement of intent rendering statute unconstitutional); *State ex rel. Lief v. Packard-Bamberger & Co.*, 123 N.J.L. 180, 184-85, 8 A.2d 291, 294-95 (1939) (statute that did not require intent unconstitutionally vague).

The *Great Atlantic & Pacific Tea Co.* court had invalidated this provision in the prior law not because of the absence of an element requiring "actual intent" but because the law had not provided for a good faith meeting competition defense. See 23 F. Supp. at 76-78. The new law had established a number of defenses that apparently adequately responded to the infirmities. See Act of Apr. 22, 1939, ch. 403, § 3, 1939 Minn. Laws 797 (close-out sales, sales of defective goods, sales pursuant to court order, and good faith attempts to meet competitor's prices excluded from application of the law).

334. See 207 Minn. at 585, 292 N.W. at 417.

335. See Act of Apr. 22, 1939, ch. 403, § 2, 1939 Minn. Laws 795.

336. 207 Minn. at 587 & n.3, 292 N.W. at 418 & n.2.

337. See *id.* at 587, 292 N.W. at 418.

338. 221 Minn. 246, 21 N.W.2d 792 (1946).

prohibition against locality price discrimination in the purchase of farm products.<sup>339</sup> In upholding the statute, the court, as a practical matter, reversed its decision in *Northwest Poultry*.<sup>340</sup> After the decision in *Northwest Poultry*, the 1945 Legislature had amended the statute to require the deduction not of "actual," but of "reasonable" costs of transportation.<sup>341</sup> Referring to the developing techniques of cost accounting, the *Lanesboro* court found that the statute, with this seemingly minor change, was no longer ambiguous.<sup>342</sup>

The court, *sua sponte*, also considered whether that statute's failure to require intent to destroy competition still violated due process.<sup>343</sup> In finding the statute valid, the court again distinguished the United States Supreme Court decision in *Fairmont Creamery*,<sup>344</sup> which had found a similar statute unconstitutional.<sup>345</sup> Although the statute still omitted the element of intent to injure or destroy competition,<sup>346</sup> the 1927 Minnesota Legislature, responding to *Fairmont Creamery*, had amended the statute to add a defense for good faith attempts to meet competition.<sup>347</sup> The Minnesota Supreme Court simply observed that *Fairmont Creamery* "no longer states the law, in view of later decisions by the Supreme Court of the United States."<sup>348</sup>

Six years later, in *Jensen v. Burnquist*,<sup>349</sup> retail grocers attempted to induce the federal district court to declare unlawful the portion of the general sales-below-cost statute prohibiting giving away, or advertising with the intent to give away, any commodity, for the purpose or effect of injuring competition.<sup>350</sup>

339. See Act of Apr. 19, 1927, ch. 252, § 3, 1927 Minn. Laws 374, as amended by Act of Apr. 24, 1937, ch. 420, § 2, 1937 Minn. Laws 611 (current version at MINN. STAT. §§ 17.15-.16 (1976)).

340. See 221 Minn. at 250-56, 21 N.W.2d at 794-96; notes 297-300 *supra* and accompanying text.

341. See Act of Mar. 23, 1945, ch. 122, 1945 Minn. Laws 180.

342. See 221 Minn. at 251-53, 21 N.W.2d at 793-95.

343. See *id.* at 256, 21 N.W.2d at 796.

344. See *id.* at 256-60, 21 N.W.2d at 796-98.

345. See notes 295-96 *supra* and accompanying text.

346. See note 333 *supra*. See generally Thatcher, *supra* note 269, at 562-67 (discussing various cases construing requirement of intent).

347. See Act of Apr. 19, 1927, ch. 252, § 3, 1927 Minn. Laws 374 (amended 1937).

348. 221 Minn. at 263, 21 N.W.2d at 799. The court reasoned that an evil motive is not necessary for the commission of a crime; therefore, the Legislature may prohibit an otherwise innocent act when done under circumstances that experience has shown will probably result in some harm. *Id.* at 260, 21 N.W.2d at 798.

349. 107 F. Supp. 446 (D. Minn. 1952) (*per curiam*).

350. See Act of Mar. 30, 1937, ch. 116, pt. 2, § 2, para. 1, 1937 Minn. Laws 182, as

The federal court refused to enjoin enforcement of the Act, finding no present threat of criminal prosecution,<sup>351</sup> and also declined to rule on the constitutionality of the Act.<sup>352</sup>

About ten years ago, the Minnesota Supreme Court issued its most recent decision concerning sales-below-cost prohibitions. In *Twin City Candy & Tobacco Co. v. A. Weisman Co.*,<sup>353</sup> one wholesale distributor of cigarettes sued to enjoin another distributor from selling cigarettes at less than actual invoice price in violation of the Minnesota Unfair Cigarette Sales Act, passed by the Legislature in 1961.<sup>354</sup> The plaintiff alleged that the defendant had sold 454 cartons of cigarettes to one of the plaintiff's customers at five cents less per carton than the defendant's invoice cost and would continue to do so unless enjoined.

In finding the Unfair Cigarette Sales Act unconstitutional,<sup>355</sup> the Minnesota Supreme Court harkened back to the United States Supreme Court decision in *Fairmont Creamery*.<sup>356</sup> Like the statute in *Fairmont Creamery*, the Unfair Cigarette Sales Act prohibition applied without requiring proof that the sales were with the intent or effect of injuring competition.<sup>357</sup>

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amended by Act of Apr. 22, 1939, ch. 403, § 1, para. 2, 1939 Minn. Laws 794 (current version at MINN. STAT. § 325.04 (1976)).

351. 107 F. Supp. at 449-50.

352. *Id.* at 449 (court deferred to state court for determination of soundness of constitutional objections and refused to decide constitutional issue when issue concerning an injunction could be resolved on other grounds).

353. 276 Minn. 225, 149 N.W.2d 698 (1967).

354. Act of May 25, 1961, ch. 35, 1961 Minn. Laws 1540.

355. 276 Minn. at 231, 149 N.W.2d at 703.

356. As in *Fairmont Creamery*, see 274 U.S. at 9, the issue in *Twin City Candy* was "whether an innocent sale, or one which does not affect competition, may constitutionally be prohibited." 276 Minn. at 234, 149 N.W.2d at 704. The absence of a requirement that the activity prohibited by the Minnesota Unfair Cigarette Sales Act be undertaken with a "predatory intent or effect" led to the finding that the Act was unconstitutional, see *id.* at 236, 149 N.W.2d at 705, a holding which, while based in part on the *Fairmont Creamery* decision, found support from cases throughout the United States. See *id.* at 233, 149 N.W.2d at 703-04 (cataloguing the case law). However, because *Fairmont Creamery* was the leading case on this point, and because the court had earlier suggested that *Nebbia* had effectively overruled *Fairmont Creamery*, see *State v. Lanesboro Produce & Hatchery Co.*, 221 Minn. 246, 258, 263, 21 N.W.2d 792, 798, 799 (1946), the Minnesota court's return to the *Fairmont Creamery* analysis in *Twin City Candy* was surprising.

357. The Unfair Cigarette Sales Act raised an irrebuttable presumption that sales of cigarettes below cost were injurious to competition. In the Act's statement of purpose, the Legislature had written:

[The] offering for sale, or sale of cigarettes below cost in the wholesale and retail trade is declared by the legislature to have the intent or effect of injuring



In reaching its conclusion, the Minnesota Supreme Court extensively reviewed the constitutionality of statutes prohibiting sales below cost.<sup>358</sup> Such statutes were declared a proper exercise of the state's police power *if* drafted with appropriate constitutional safeguards affording alleged violators an opportunity to show that the sale below cost was with innocent intent or without injurious effect.<sup>359</sup>

The court in *Twin City Candy* distinguished *Lanesboro*,<sup>360</sup> which had sustained the statute prohibiting discrimination in the purchase of farm products without reference to intent or effect, on the basis that *Lanesboro* literally considered only whether the statute was too vague and, further, dealt with the "patently unfair practice of paying different prices for the same commodity in different localities."<sup>361</sup>

### B. Interpretative Cases

Twenty years after the 1937 Unfair Trade Practices Act was passed, the first decision pertaining to the Act's substantive meaning—as opposed to its constitutionality—was rendered. In

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a competitor, destroying or lessening competition, and is deemed an unfair and deceptive business practice and an unfair method of competition.

Minnesota Unfair Cigarette Sales Act, ch. 35, § 1, para. 2, 1961 Minn. Laws 1541.

In drafting this legislation, the Legislature was apparently relying upon the principle of judicial restraint, one statement of which is found in *Nebbia v. New York*, 291 U.S. 502 (1934):

So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio*.

*Id.* at 537 (emphasis in original). The Minnesota court in *Twin City Candy* did not attempt to overrule the legislative policy; it did find, however, that the method of implementing that policy was unconstitutional. See notes 358-61 *infra* and accompanying text.

358. See 276 Minn. at 233-36, 149 N.W.2d at 704-05.

359. *Id.* at 228, 149 N.W.2d at 701.

360. See notes 338-48 *supra* and accompanying text.

361. 276 Minn. at 234, 149 N.W.2d at 704. Apparently disregarded by the *Twin City Candy* court was the provision in the Minnesota Unfair Cigarette Sales Act that exempted sales made in good faith to meet the lawful prices of competitors. See Minnesota Unfair Cigarette Sales Act, ch. 35, § 8, subd. 1, 1961 Minn. Laws 1544. The statute construed by the *Lanesboro* court contained a similar exemption, which the court held was sufficient to sustain the statute against a charge of unconstitutionality. See 221 Minn. at 259, 21 N.W.2d at 798.

*State v. Wolkoff*,<sup>362</sup> the state sought to enjoin five "Cut Price Super Markets" from advertising and selling ketchup, coffee, and sugar below cost. The trial court had found the advertisements and sales were not made with the necessary purpose or effect of injuring and destroying competition in violation of the Act.<sup>363</sup>

In affirming the trial court's findings of fact and ruling in favor of the supermarkets, the Minnesota Supreme Court provided the following interpretations of the prohibition of sales below cost:

(1) The Act is not violated unless both injury to competitors and destroying competition is established as *either* the purpose or effect of a defendant's actions.<sup>364</sup>

(2) The defense for sales made "[i]n an endeavor made in good faith to meet the legal prices of a competitor"<sup>365</sup> in the same locality did not require a party to establish the actual legality of a competitor's prices.<sup>366</sup> It is sufficient if the merchant in good faith believes the competitor's price is legal.<sup>367</sup> If a competitor

362. 250 Minn. 504, 85 N.W.2d 401 (1957).

363. The statute construed by the *Wolkoff* court, see Act of Mar. 30, 1937, ch. 116, pt. 2, § 2, para. 1, 1937 Minn. Laws 182, as amended by Act of Apr. 22, 1939, ch. 403, § 1, 1939 Minn. Laws 794, as amended by Act of Apr. 21, 1941, ch. 326, § 1, 1941 Minn. Laws 617, differed from the present statute in its requirement that the prohibited activity have the effect or purpose of injuring competitors and destroying competition. In 1957, a few months before the court handed down the *Wolkoff* opinion, the Legislature had amended the Act to require that the prohibited activity either have the purpose or effect of injuring a competitor or the purpose or effect of destroying competition. See Act of Apr. 27, 1957, ch. 822, § 2, 1957 Minn. Laws 1161. Thus, the *Wolkoff* court's interpretation of the Act that "both injury to competitors and the destroying of competition must be established as *either* the purpose or effect of the defendant's actions in order to find or sustain a violation," 250 Minn. at 507-08, 85 N.W.2d at 405 (emphasis in original), is no longer viable. Proof that the purpose or effect of the activity was to injure competitors or destroy competition under the present law would establish a violation. See *State v. Applebaums Food Mkts., Inc.*, 259 Minn. 209, 213, 106 N.W.2d 896, 899-900 (1960) (noting the amendment); *id.* at 217, 106 N.W.2d at 902 (noting that the *Wolkoff* opinion had been decided without reference to the amendment and that the pendency of *Wolkoff* in the court had not influenced the Legislature to amend the statute).

364. 250 Minn. at 507-08, 85 N.W.2d at 405.

365. MINN. STAT. § 325.06(4) (1976).

366. 250 Minn. at 512, 85 N.W.2d at 407-08.

367. In other states, however, statutes that provided for a good faith defense when a seller attempted to meet the lawful prices of competitors were struck down as unconstitutionally vague. For example, in *State ex rel. Lief v. Packard-Bamberger & Co.*, 123 N.J.L. 180, 8 A.2d 291 (1939), the court commented on the provision in the New Jersey statute that excepted sellers who were meeting the "legal prices" of a competitor and concluded:

How a person is to determine the legality of the price of a competitor is not declared [in the statute], and the impracticability, if not the impossibility of determining the "legality" of a competitor's price is obvious.

. . . .

. . . A retailer may not only ordinarily not sell below cost to him, but, if he

advertises a certain price over a long period of time without being challenged, and apparently without adverse economic effects, a merchant may be warranted in assuming the price is legal.<sup>368</sup>

(3) Competitors' prices are relevant not only to establish the meeting competition defense but also to prove the defendant's purpose in setting its own prices (for example, destruction of competition or, to the contrary, business survival) and to prove the effect of the defendant's prices.<sup>369</sup>

(4) Because of the variation in wording of price discrimination statutes from state to state, there was no specific judicial interpretation elsewhere of the phrase "destroying competition."<sup>370</sup> That phrase in the Minnesota statute would be construed as not requiring elimination of all competition to establish a violation but, "at the very least, some substantial damage to the competitive atmosphere of the defendant's trade area or to a competitor."<sup>371</sup>

A few years after the *Wolkoff* decision, the Minnesota Attorney General again attempted to enforce the prohibition against sales below cost.<sup>372</sup> In *State v. Applebaums Food Markets, Inc.*,<sup>373</sup> Applebaums, which operated eleven retail grocery stores throughout the Saint Paul area and one in Minneapolis, was accused of selling goods below cost and of giving away merchandise and trading stamps. The Minnesota Supreme Court ruled that it was improper for the trial court to have granted a temporary injunction

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seeks to meet competition, he must expertly study and determine that he is buying under market conditions that are justified, or that the price of a competitor, which he must meet, is "legal". It is apparent that the statutory inhibitions are uncertain and indefinite.

*Id.* at 185, 8 A.2d at 294; *cf.* *Daniel Loughran Co. v. Lord Baltimore Candy & Tobacco Co.*, 178 Md. 38, 47-48, 12 A.2d 201, 206-07 (1940) (provision in statute prohibiting use of sales that could not be justified by "existing market conditions" in determining cost of doing business made statute unconstitutionally vague and arbitrary).

368. 250 Minn. at 512, 85 N.W.2d at 407.

369. *See id.* at 512-13, 85 N.W.2d at 407-08. Thus, the trial court's conclusion that the defendants were not destroying competition was supported by evidence that the defendant's competitors were advertising the same or lower prices five months before the defendants' advertisements and for some time thereafter; that during the two years preceding the violations, the defendants' relative position in the market decreased almost 21%, while their competitors' business increased 41% and 46%; and that the defendants' chain of grocery stores competed with larger chains as well as smaller grocers. *Id.* at 518-19, 85 N.W.2d at 411.

370. *See id.* at 516, 85 N.W.2d at 409-10.

371. *Id.* at 517, 85 N.W.2d at 410.

372. The statute had been amended since the *Wolkoff* decision. *See* note 363 *supra*.

373. 259 Minn. 209, 106 N.W.2d 896 (1960).

against Applebaums,<sup>374</sup> and the state was frustrated again in its attempt to enforce the statute. The court rejected the position of the state that the statute as amended after *Wolkoff*<sup>375</sup> justified issuance of a temporary injunction upon a simple showing of "threatened" injury to a competitor.<sup>376</sup> Rather, a showing of the purpose or effect of injuring a competitor or destroying competition was necessary.<sup>377</sup> All competition injures competitors, the court observed, because advertising and reductions in the market price of goods are intended to attract additional customers.<sup>378</sup>

In a long dissent, Justice Loevinger, with Justice Murphy concurring, further described the facts and argued that the temporary injunction should have been upheld.<sup>379</sup> Among the "evils" being perpetrated was Applebaums' advertising that it would give away an automobile and certificates worth \$100 in the purchase of clothing at a local store.<sup>380</sup> Essentially, Justice Loevinger would have allowed injunctive relief whenever the facts, as in *Applebaums*, demonstrated sales below cost.<sup>381</sup> "[D]efendant's purpose was to draw business to itself and away from its competitors by the acts mentioned,"<sup>382</sup> he remarked, and concluded: "[N]o proposition is better established in this field of law than

374. See *id.* at 216, 106 N.W.2d at 901.

375. See note 363 *supra*.

376. The Commissioner of the Department of Business Development, then charged with enforcement of the Act, see Act of Apr. 27, 1957, ch. 822, § 3, 1957 Minn. Laws 1162 (amended 1967), attempted to persuade the court to adopt a doctrine of incipency by which to determine whether a preliminary injunction should issue. This doctrine would have permitted a trial court to issue an injunction upon a simple showing of threatened injury and without any showing of the defendant's purpose or effect in engaging in the activity threatening the injury. The court rejected this argument not only because its adoption would have effectively overruled *Wolkoff* but also because its application could possibly lead to unconstitutional infringements upon trade such as those found in *Fairmont Creamery*. See 259 Minn. at 214 & n.4, 215, 106 N.W.2d at 900 & n.4.

377. See 259 Minn. at 214, 106 N.W.2d at 900 ("A mere sale below cost, absent the requisite statutory purpose or effect, is not a violation or threatened violation [of the Act]."). See also *Des Moines Area Dairy Queen Store Operators & Owners, Inc. v. Wapello Dairies, Inc.*, 226 N.W.2d 9, 12 (Iowa 1975) (complaint that did not allege facts showing a purpose or effect to injure competition dismissed for failure to state claim under Iowa price discrimination statute).

378. See 259 Minn. at 215, 106 N.W.2d at 901. This statement was not challenged by dissenting Justice Loevinger. In his view, this oversimplified observation was not the crucial question posed by the Act. Rather, the issue related to "whether or not the means utilized to divert trade from a competitor is legally permissible." *Id.* at 223, 106 N.W.2d at 905 (Loevinger, J., dissenting).

379. See *id.* at 227, 106 N.W.2d at 908 (Loevinger, J., dissenting).

380. See *id.* at 219, 106 N.W.2d at 903 (Loevinger, J., dissenting).

381. See *id.* at 221, 106 N.W.2d at 904 (Loevinger, J., dissenting).

382. *Id.* at 222, 106 N.W.2d at 905 (Loevinger, J., dissenting).

that diversion of trade from a competitor is an injury for which the law affords a remedy if the means used are improper.<sup>383</sup> He also noted that the widely advertised offer to give away valuable items and sell other items at less than cost—made over a long period of time and requiring the filling out of coupons and depositing them in one of the defendant's stores—showed that the practices were undertaken for no other purpose than to unlawfully divert trade from competitors to the defendant.<sup>384</sup>

### C. *Summary of Minnesota Decisions—Relevance of Statutes from Other States*

Court decisions in the over seventy years since enactment in 1907 of the first Minnesota statute prohibiting price discrimination<sup>385</sup> have considered little more than the constitutionality of such statutes, and have not created a structure of decisional law by which the legality of any particular practice can be predicted with any certainty. We know that section 325.03,<sup>386</sup> previously Part 1 of the 1937 Unfair Trade Practices Act,<sup>387</sup> is constitutional.<sup>388</sup> Similarly, the section 325.04 prohibition against sales below cost,<sup>389</sup> derived from Part 2 of the 1937 Act,<sup>390</sup> as amended after the *Great Atlantic & Pacific Tea Co.* case,<sup>391</sup> is constitutional.<sup>392</sup> The constitutionality of the present locality price discrimination provision in section 325.04,<sup>393</sup> however, as amended following the finding of unconstitutionality in *Great Atlantic & Pacific Tea Co.*,<sup>394</sup> has not been decided.

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383. *Id.* at 222-23, 106 N.W.2d at 905 (Loevinger, J., dissenting).

384. *Id.* at 222, 106 N.W.2d at 905 (Loevinger, J., dissenting). Justice Loevinger thus drew an inference from the evidence that the majority of the court was unprepared to do. *See id.* at 224-25, 106 N.W.2d at 906 (Loevinger, J., dissenting) (imposing requirement of proving purpose or effect would "erect a nearly insuperable barrier to enforcement").

385. The 1907 statute dealt with unlawful sales of petroleum products. *See generally* notes 172-84 *supra* and accompanying text.

386. *See* notes 25-40 *supra* and accompanying text.

387. *See* Act of Mar. 30, 1937, ch. 116, pt. 1, 1937 Minn. Laws 181 (current version at MINN. STAT. § 325.03 (1976)).

388. *See* *Great Atl. & Pac. Tea Co. v. Ervin*, 23 F. Supp. 70, 83 (D. Minn. 1938) (*per curiam*); notes 319-21 *supra* and accompanying text.

389. *See* notes 116-45 *supra* and accompanying text.

390. *See* Act of Mar. 30, 1937, ch. 116, pt. 2, § 2, para. 1, 1937 Minn. Laws 182 (current version at MINN. STAT. § 325.04 (1976)).

391. *See* Act of Apr. 22, 1939, ch. 403, § 1, 1939 Minn. Laws 795 (current version at MINN. STAT. § 325.04 (1976)).

392. *See* *McElhone v. Geror*, 207 Minn. 580, 585, 292 N.W. 414, 417 (1940); notes 325-37 *supra* and accompanying text.

393. *See* notes 41-64 *supra* and accompanying text.

394. *See* Act of Apr. 22, 1939, ch. 403, § 1, 1939 Minn. Laws 795 (current version at

No decisions have interpreted either of the two locality price discrimination prohibitions in attempting to define the boundaries of permitted or forbidden practices. The two interpretative cases, *Wolkoff*<sup>395</sup> and *Applebaums*,<sup>396</sup> have given a very broad superstructure on which to base an interpretation of the section 325.04 sales-below-cost provision.<sup>397</sup> In neither case was the conduct in question found unlawful.<sup>398</sup> The two decisions afford little insight into the type of conduct that will constitute an unlawful sale below cost. In short, there is a dearth of decisional law on the meaning of either the Minnesota price discrimination and sales-below-cost statutes of general application or the statutes directed toward particular products. Of course, a great body of decisions interpreting the Robinson-Patman Act is available. These decisions are not helpful, however, because the Minnesota statutes depart so far from the wording in the Robinson-Patman Act.<sup>399</sup>

If court interpretations from Minnesota offer but little insight into the Minnesota price discrimination and sales-below-cost statutes, perhaps statutes in other states, and the interpretations placed upon them, can offer a surrogate in which an interpretation can be found. Most other states do have statutes somewhat comparable to those in Minnesota.<sup>400</sup> Many states prohibit price discrimination, particularly, locality discrimination.<sup>401</sup> About half of the states also have statutes prohibiting sales below cost.<sup>402</sup> In addition, statutes prohibiting price discrimination or sales below cost with respect to specific products have been enacted by many state legislatures.<sup>403</sup>

A review of the statutes cited in the Appendix indicates widely disparate provisions among the various statutes. Some prohibit price discrimination only when its effect is to injure or destroy competition;<sup>404</sup> others are operative regardless of effect when the intent is to injure competition.<sup>405</sup> Many provide, in differing

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MINN. STAT. § 325.04 (1976)).

395. See notes 362-71 *supra* and accompanying text.

396. See notes 373-84 *supra* and accompanying text.

397. See notes 364-71, 374-78 *supra* and accompanying text.

398. See notes 362-84 *supra* and accompanying text.

399. Compare MINN. STAT. §§ 325.02-.075 (1976) with Robinson-Patman Act §§ 1-2, 15 U.S.C. §§ 13-13a (1976).

400. See Appendix.

401. See Appendix § A.2.

402. See Appendix § B.

403. See Appendix § E.

404. See Appendix § A.1.a.

405. See Appendix § A.1.b.

terms, that price discrimination is prohibited when it occurs in different localities, although what constitutes a locality varies from state to state.<sup>406</sup> Some statutes expressly deal with indirect forms of discrimination, such as rebates, while others are silent on the subject.<sup>407</sup>

Available exemptions also differ widely from state to state.<sup>408</sup> Statutes that prohibit sales below cost contain presumptions of the cost of doing business, or overhead expense, which vary from twelve percent to four percent for retailers.<sup>409</sup> Remedies and penalties also are far from uniform.<sup>410</sup> Products singled out for treatment by special legislation range from hearing aids<sup>411</sup> to music;<sup>412</sup> but alcoholic beverages,<sup>413</sup> cigarettes,<sup>414</sup> farm products,<sup>415</sup> insurance,<sup>416</sup> and petroleum products<sup>417</sup> are commonly treated subjects.

In short, while most state legislatures have been motivated to adopt statutes directed against price discrimination and sales below cost, there is little consistency from state to state, and no "model act" exists to provide a framework against which statutes in each state can be interpreted.<sup>418</sup> No cohesive body of statutes or case law creates a generally understood structure defining unlawful sales below cost or price discrimination.

As is true in most states, the Minnesota statutes are the *sui generis* inventions of the state legislature dealing with problems as the Legislature perceived them, but lacking the buttressing of legislation and court interpretations from other jurisdictions that could give meaning to the Minnesota statutes. There is no body of national precedent to compensate for the dearth of interpretation of the Minnesota statutes concerning price discrimination

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406. See Appendix § A.2.

407. See Appendix § D.

408. See Appendix §§ A.3, B.3.

409. See Appendix § B.2.

410. See Appendix §§ A.4, B.4.

411. See ARIZ. REV. STAT. ANN. § 36-1901(7)(f) (1974).

412. See, e.g., NEB. REV. STAT. § 59-1405 (1974). The state statutes relating to particular products are contained in Appendix § E.

413. See Appendix § E.1.

414. See Appendix § E.2.

415. See Appendix § E.3.

416. See Appendix § E.4.

417. See Appendix § E.5.

418. California did provide a model for enactment in the 1930's, which a few states followed. Thatcher, *supra* note 269, at 559. As Thatcher notes: "Not a few states, in their legislative haste, perpetuated a typographical error appearing in the California act in the section relating to the interpretation of the act inadvertently calling for 'literal' instead of 'liberal' construction." *Id.* at 559-60 (footnotes omitted).

and sales below cost.<sup>419</sup> Thus, the scope and application of the Minnesota statutes must await further decisions from the Minnesota Supreme Court.

#### IV. THE ULTIMATE ISSUE

In preceding sections of this Article, the present collection of Minnesota prohibitions against locality price discrimination and sales below cost has been examined.<sup>420</sup> It is apparent that the present statutes, when compared and analyzed together, are something less than a cohesive and clear expression of legislative purpose. Further, statutes in other jurisdictions, both state and federal, supply little assistance due to the lack of uniformity among the jurisdictions.<sup>421</sup> In this section of the Article, the focus is upon proposals for additional price discrimination legislation<sup>422</sup> as well as for reform.<sup>423</sup> Initially, the purpose of establishing prohibitions against locality price discrimination and sales below cost will be examined.<sup>424</sup> By understanding why the statutes were enacted, the continued need for the prohibitions can be assessed with greater certainty. In this connection, the reasons for repeal of the fair trade laws also will be considered.<sup>425</sup> Hopefully, this analysis will assist the reader in reaching a conclusion on the ultimate issue posed by this Article: Should the Minnesota prohibitions be repealed, amended, or left alone?

##### A. *The Legislative Purpose*

The legislative rationale behind the original enactment of the Minnesota price discrimination and sales-below-cost statutes was more social than economic. The purpose of the statutes has been identified in decisions of the Minnesota Supreme Court as the protection of the small local seller from the competition of the

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419. The problem was recognized by the Minnesota Supreme Court in *State v. Wolkoff*, 250 Minn. 504, 85 N.W.2d 401 (1957). In *Wolkoff* the court sought an interpretation of the phrase "destroying competition" as found in section 325.04 from the decisions in other states. See *id.* at 515-16, 85 N.W.2d at 409-10. Finding no comparable language in other states that appeared to offer a solution, the court turned to the dictionary to formulate an interpretation. See *id.* at 516, 85 N.W.2d at 410.

420. See notes 12-265 *supra* and accompanying text.

421. See notes 400-19 *supra* and accompanying text; Appendix.

422. See notes 454-501 *infra* and accompanying text.

423. See notes 502-53 *infra* and accompanying text.

424. See notes 426-32 *infra* and accompanying text.

425. See notes 433-53 *infra* and accompanying text.



strong and perhaps more efficient national or regional seller.<sup>426</sup> In *State v. Northwest Poultry & Egg Co.*,<sup>427</sup> while finding unconstitutional the statute prohibiting locality discrimination in the purchase of farm products, the court recognized that the statute promoted a

clear legislative intent to prevent the destruction of local produce dealers through unfair discrimination by competitors more amply buttressed with capital. Monopolies gained through the misuse of an economic advantage to the direct injury of small merchants and the ultimate injury of producing and consuming classes are to be forestalled.<sup>428</sup>

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426. As the court commented in *McElhone v. Geror*, 207 Minn. 580, 292 N.W. 414 (1940):

The strong have no unlimited constitutional power so to use their strength as to crush the weak. . . . The independent merchant, small or large, is a legitimate object of legislative solicitude. It cannot be otherwise in view of his contribution to the building of, and his present place in, our economic structure.

*Id.* at 583-84, 292 N.W. at 417. The Wyoming Supreme Court, in *State v. Langley*, 53 Wyo. 332, 84 P.2d 767 (1938), similarly discussed the value of the independent merchant: Great aggregations of wealth control much of the merchandising field of today. It is not necessary to say that that is an evil. We may even admit that it is a benefit. At the same time we still have with us the independent merchants. They, too, of course, are subject to the prohibition of the statute [prohibiting sales below cost], but it was probably intended mainly for their benefit. They have hitherto been considered as part of the "backbone" of every community, radiating their influence throughout the length and breadth of the state, maintaining, not alone fair competition, but adding to, and upholding, the moral fibre of the communities, upon which, in the long run, the existence of the commonwealth depends. The legislature has the right, we think, to give them a fair chance in the field of competition; to give them a chance to remain a pillar of support, thus at the same time giving an opportunity for the maintenance of individualism, still of importance in our day, and which, except for such legislation, might be entirely crushed.

*Id.* at 351-52, 84 P.2d at 774. See generally *May's Drug Stores, Inc. v. State Tax Comm'n*, 242 Iowa 319, 322-27, 45 N.W.2d 245, 247-49 (1950) (collecting statements of purpose from various states).

Perhaps one of the more colorful statements of the purpose of price discrimination legislation is found in *Borden Co. v. McDowell*, 8 Wis. 2d 246, 99 N.W.2d 146 (1959), where the court noted that:

The monopolistic tendencies in merchandising practices which the legislature perceived and believed to be inconsistent with the public welfare were not mere bogies under the bed but beliefs based on facts which reasonable and honest men could entertain even if other men equally honest and reasonable might see the facts differently and reach different conclusions.

*Id.* at 262, 99 N.W.2d at 155-56.

427. 203 Minn. 438, 281 N.W. 753 (1938), discussed in notes 297-99 *supra* and accompanying text.

428. 203 Minn. at 442, 281 N.W. at 755.

Similarly, the court in *McElhone v. Geror*<sup>429</sup> stated that the sales-below-cost statute "is definitely designed to protect the weak against the strong."<sup>430</sup> More recently, the Minnesota Supreme Court reiterated the same proposition with respect to the Unfair Cigarette Sales Act. The court stated in *Twin City Candy & Tobacco Co. v. A. Weisman Co.*:<sup>431</sup>

Virtually every state has adopted a "fair trade" law in one form or another. The practice of advertising and selling "loss leaders", or what have been sometimes described as loss "misleaders", has been found by legislatures to result in financially strong companies driving weaker companies out of business, thereby opening the door to the monopolies which the law is designed to prevent. The charge is made that sales at less than cost by chain stores result in regional discrimination because the loss to the vendor in one community must be recouped by excessive charges in another. A further justification for the statute is the likelihood of deception arising from the public's notion that if one item is sold below cost, others will be equally cheap, whereas they may actually be exorbitantly high.<sup>432</sup>

Thus, these purposes seem similar for both locality discrimination and sales-below-cost statutes.

The most significant indication of the climate in which the Minnesota Unfair Trade Practices Act was passed is afforded by knowing the company it kept. On the same day that the Unfair Trade Practices Act was approved in 1937, the Minnesota Fair Trade Act also was approved,<sup>433</sup> allowing minimum resale price agreements between a supplier and its customers whereby the customers agreed not to resell the products at a price less than that specified by the supplier.<sup>434</sup>

The Miller-Tydings Act,<sup>435</sup> passed by Congress in 1937, amended section 1 of the Sherman Act<sup>436</sup> to enable states to pass fair trade acts.<sup>437</sup> Without the Miller-Tydings Act, resale price

429. 207 Minn. 580, 292 N.W. 414 (1940), discussed in notes 326, 328-37 *supra* and accompanying text.

430. 207 Minn. at 583, 292 N.W. at 416.

431. 276 Minn. 225, 149 N.W.2d 698 (1967), discussed in notes 353-61 *supra* and accompanying text.

432. 276 Minn. at 229, 149 N.W.2d at 701-02 (footnotes omitted).

433. Act of Mar. 30, 1937, ch. 117, 1937 Minn. Laws 185 (repealed 1978).

434. *Id.* § 2.

435. Miller-Tydings Act, ch. 690, 50 Stat. 693 (1937) (repealed 1975).

436. Sherman Act, ch. 647, § 1, 26 Stat. 209 (1890) (current version at 15 U.S.C. § 1 (1976)).

437. See *Sunbeam Corp. v. MacMillan*, 110 F. Supp. 836, 841 (D. Md. 1953); *Pepsodent*

agreements would have violated section 1 of the Sherman Act.<sup>438</sup> The purpose underlying the Minnesota Fair Trade Act supposedly was to protect the goodwill of a supplier owning a trademark on a particular product by assuring uniform prices.<sup>439</sup> Of course, suppliers, in exercising their rights under the Fair Trade Act, were unlikely to ask their customers to lower resale prices.<sup>440</sup> Rather, fair trade acts were perceived and employed as another vehicle to achieve higher prices.<sup>441</sup>

Congress repealed the Miller-Tydings Act in 1975<sup>442</sup> and the Minnesota Fair Trade Act was repealed in 1978.<sup>443</sup> The effect of the repeal of the Minnesota Act, in addition to acknowledging the renewed federal prohibition of resale price maintenance, was to prohibit resale price agreements solely in intrastate commerce.<sup>444</sup>

Co. v. Krauss Co., 56 F. Supp. 922, 927 (E.D. La. 1944); S. REP. NO. 466, 94th Cong., 1st Sess., reprinted in [1975] U.S. CODE CONG. & AD. NEWS 1569, 1569-70.

438. See *Sunbeam Corp. v. MacMillan*, 110 F. Supp. 836, 841 (D. Md. 1953); S. REP. NO. 466, 94th Cong., 1st Sess., reprinted in [1975] U.S. CODE CONG. & AD. NEWS 1569, 1569-70.

439. *Remington Arms Co. v. G.E.M. of St. Louis, Inc.*, 257 Minn. 562, 566, 571, 102 N.W.2d 528, 532, 535 (1960).

440. See Bowman, *The Prerequisites and Effects of Resale Price Maintenance*, 22 U. CHI. L. REV. 825, 838 (1955).

441. See *id.* at 852-58; Herman, *A Note on Fair Trade*, 65 YALE L.J. 23, 25, 30 (1955); cf. Bowman, *supra* note 440, at 850-52 (citing conflicting studies as to the effect of fair trade laws on prices). But see Adams, *Resale Price Maintenance: Fact and Fancy*, 64 YALE L.J. 967, 973 (1955).

442. See Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, § 2, 89 Stat. 801.

443. See Act of Mar. 9, 1978, ch. 473, 1978 Minn. Laws 77.

444. See *Tape of Meeting on S.F. 1647 Before the Minnesota Senate Commerce Committee*, 70th Minn. Legis., 1st Sess. (Feb. 3, 1978). Counsel for the Minnesota Senate Commerce Committee explained the bill repealing the Minnesota Fair Trade Act as follows:

The proposed legislation repeals those provisions of state law commonly known as the "Fair Trade Act". These provisions generally authorize contracts for the sale of trademarked, branded, or named goods to contain provisions prohibiting the buyer from reselling the goods at less than a minimum price stipulated by the seller, or prohibiting the buyer from, in turn, selling to another who will resell at a price less than the minimum stipulated price of the seller. Were it not for the Fair Trade Act under state law, these agreements would be prohibited as a form of price fixing or refusal to deal under the state antitrust statutes.

At the present time, the state Fair Trade Act applies only with respect to intrastate commerce, i.e. transactions where the buyer and seller and actual transaction are located within the boundaries of the state of Minnesota.

Up until 1975, the federal antitrust provisions relating to interstate commerce provided a special exemption from the provisions prohibiting price fixing for agreements authorized under state fair trade acts. Therefore, prior to 1975, agreements setting minimum resale prices were specifically authorized both as to interstate commerce and intrastate commerce. In 1975, the specific exemp-

Legislative commentary on the repeal of the Miller-Tydings Act is instructive. A United States Senate report concerning the Consumer Goods Pricing Act of 1975,<sup>445</sup> which repealed the Miller-Tydings Act, stated that fair trade laws "permit competing retailers to have identical prices and thus eliminate price competition between them. Repeal of the fair trade laws should result in a lowering of consumer prices."<sup>446</sup> The report, noting that the Federal Council on Wage and Price Stability advocated repeal,<sup>447</sup> also referenced studies by the Department of Justice that indicated the consumer would be saved \$1.2 billion a year by eliminating fair trade laws that have increased prices on fair-traded goods by eighteen to twenty-seven percent.<sup>448</sup> Thus, the Senate report concluded, inflation was caused in part by fair trade laws and could be curtailed by their repeal.<sup>449</sup> Presumably, similar considerations may have motivated repeal of the Minnesota Fair Trade Act, although the sparse legislative history suggests that the Minnesota Legislature was merely responding to the congressional action.<sup>450</sup>

In short, fair trade acts and the Minnesota Unfair Trade Practices Act of 1937, prohibiting locality discrimination and sales below cost, were depression-years legislation.<sup>451</sup> The problem ad-

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tion to the federal antitrust statute for fair trade laws was removed so that "fair trading" as the transactions affected interstate commerce was prohibited as price fixing under the federal antitrust statute. After the 1975 amendment, then, only fair trading as to wholly intrastate transactions is permitted in Minnesota and, under this proposed legislation, fair trading in intrastate transactions would also be prohibited.

Minnesota Senate Counsel, *Summary of S.F. 1647 Repealing the Fair Trade Laws*, in MINNESOTA SENATE COMMERCE COMMITTEE BOOK (Feb. 3, 1978).

445. S. REP. NO. 466, 94th Cong., 1st Sess., reprinted in [1975] U.S. CODE CONG. & AD. NEWS 1569-72.

446. *Id.* at 1, reprinted in [1975] U.S. CODE CONG. & AD. NEWS at 1569-70.

447. *Id.* at 3, reprinted in [1975] U.S. CODE CONG. & AD. NEWS at 1571. Other groups calling for repeal included the Justice Department, the Federal Trade Commission, consumer groups, discount stores, and smaller business associations. *Id.*

448. *Id.* at 6, reprinted in [1975] U.S. CODE CONG. & AD. NEWS at 1572.

449. *See id.* The report indicates "that fair trade laws increase prices on fair traded goods by 18-27 percent." *Id.*

450. The only substantive comments on the bill that proposed repeal of the Minnesota Fair Trade Act were made in the Senate Commerce Committee. *See generally Tape of Meeting on S.F. 1647 Before the Minnesota Senate Commerce Committee*, 70th Minn. Legis., 2d Sess. (Feb. 3, 1978). Senator Davies, the bill's co-author, stated that because the Miller-Tydings Act was repealed, the State Fair Trade Law had to be repealed to eliminate dead language from the statute. *See id.*

451. *See Engman, The Case for Repealing 'Fair Trade,' 7 ANTITRUST L. & ECON. REV.* 79, 80 (1975).

dressed was ever-decreasing prices, not ever-increasing prices<sup>452</sup> (the chronic economic disease of the 1970's).<sup>453</sup> The fate of the companion to the Minnesota Unfair Trade Practices Act should not in and of itself demand repeal of the Act. The reasons for repeal of fair trade laws, however, do suggest caution in enacting further legislation against price discrimination and also indicate that the Minnesota Legislature should review the economic effect and continued necessity of the existing prohibitions.

### *B. Recently Proposed Minnesota Price Discrimination Legislation*

Two bills relating to price discrimination were introduced during the 1977 Minnesota legislative session. These bills, House File 340<sup>454</sup> and House File 722,<sup>455</sup> will be examined to determine the goal each was perceived to accomplish and to assess the ramifications of each proposal.

#### *1. House File 340*

House File 340,<sup>456</sup> introduced on February 7, 1977,<sup>457</sup> offered an

452. *See id.*

453. *See id.* at 79, 80, 83.

454. H.F. 340, 70th Minn. Legis., 1st Sess. (1977) is reproduced in pertinent part in footnote 456 *infra*.

455. H.F. 722, 70th Minn. Legis., 1st Sess. (1977) appears in part in footnote 490 *infra*.

456. The bill read, in pertinent part:

Section 1. Minnesota Statutes 1976, Section 325.8015, is amended to read:  
325.8015 [PRICE FIXING; PRODUCTION CONTROL; ALLOCATION OF MARKETS; COLLUSIVE BIDDING; AND CONCERTED REFUSALS TO DEAL.] Subdivision 1. Without limiting section 325.8013, the following shall be deemed to restrain trade or commerce unreasonably and are unlawful:

Subd. 2. A contract, combination, or conspiracy between two or more persons in competition:

.....  
Subd. 6. A contract, combination or conspiracy to directly or indirectly discriminate, or the knowing solicitation or receipt of a discrimination in price between different purchasers of commodities or services of substantially like grade and quality, where such commodities or services are sold for use, consumption, or resale within this state, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of trade or commerce in any section of this state. Nothing herein shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities or services are to such purchasers sold or delivered. Nothing herein shall prevent persons doing business in this state from selecting their own customers in bona fide transactions and not in restraint of trade, nor shall it prevent price changes from time to time where in response to changing conditions affecting the market for or marketability of the commodi-

amendment to section 325.8015<sup>458</sup> of the Minnesota antitrust law,<sup>459</sup> which would have added a new subdivision 6 dealing with price discrimination.<sup>460</sup> There is no record of legislative action on H.F. 340, which was assigned to the House Commerce and Economic Development Committee.<sup>461</sup> The purpose of the amendment therefore must be discerned simply by reading its provisions.

As proposed, subdivision 6 appeared to be modeled after the Robinson-Patman Act,<sup>462</sup> but with some significant differences. First, unlike the Robinson-Patman Act, subdivision 6 would have prohibited only a "contract, combination or conspiracy to directly or indirectly discriminate . . . in price,"<sup>463</sup> which appears to be a grafting of the wording of section 1 of the Sherman Act to the proposed Minnesota equivalent of the Robinson-Patman Act.<sup>464</sup> Thus, to establish a violation under subdivision 6, a plaintiff would be required to prove the existence of a "contract, combination or conspiracy" in addition to a discriminatory practice.<sup>465</sup> While it is doubtful whether the drafters of H.F. 340 in-

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ties or services concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned. Upon proof being made, at any hearing on a complaint under this subdivision, that there has been discrimination in price of commodities or services furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this subdivision. Nothing herein shall prevent a seller rebutting the prima facie case thus made by showing that his lower price was made in good faith to meet an equally low price of a competitor.

H.F. 340, 70th Minn. Legis., 1st Sess. (1977) (emphasis omitted).

457. See MINN. H.R. JOUR. 189 (1977).

458. MINN. STAT. § 325.8015 (1976 & Supp. 1977) contains the general prohibitions against unlawful restraints upon trade and commerce in effect in Minnesota.

459. See *id.* §§ 325.8011-.8028.

460. See note 456 *supra*.

461. See MINN. H.R. JOUR. 189 (1977).

462. Compare H.F. 340, § 1(6), 70th Minn. Legis., 1st Sess. (1977) with Robinson-Patman Act § 2(a)-(b), 15 U.S.C. § 13(a)-(b) (1976).

463. H.F. 340, § 1(6), 70th Minn. Legis., 1st Sess. (1977). In contrast, the Robinson-Patman Act § 1, 15 U.S.C. § 13 (1976) prohibits "any person engaged in commerce . . . [from] either directly or indirectly [discriminating] in price between different purchasers of commodities."

464. Sherman Act § 1, 15 U.S.C. § 1 (1976) states: "Every contract, combination . . . , or conspiracy, in restraint of trade or commerce . . . is declared to be illegal . . . ."

465. While the phrase "contract, combination, or conspiracy" might appear to require an agreement between sellers, this language has not been so construed by the United States Supreme Court. Section 1 of the Sherman Act, which contains the same language, has been held to be satisfied by a contract between a buyer and his seller. See *Albrecht v. Herald Co.*, 390 U.S. 145, 149-50 (1968); Sherman Act § 1, 15 U.S.C. § 1 (1976). This

tended any substantive difference between proposed subdivision 6 and the Robinson-Patman Act, this anomaly in the drafting of H.F. 340 can be explained only as the result of folding the basic price discrimination provision into the Minnesota prohibition against contracts in restraint of trade.<sup>466</sup> The consequence may be to limit the application of subdivision 6 to situations in which, instead of a single seller discriminating, a group of sellers engages in concerted discriminatory practices.<sup>467</sup> Perhaps the drafters of H.F. 340 believed that any discriminatory transaction would satisfy the requirement of a "contract, combination or conspiracy" with the seller and the buyer (although innocent) being the two "conspirators."<sup>468</sup>

Proposed subdivision 6 contains another marked difference from the Robinson-Patman Act. Unlike the federal legislation, subdivision 6 would apply equally to discrimination in price between purchasers of commodities *or services*.<sup>469</sup> The Robinson-Patman Act is limited in application to purchasers of commodities,<sup>470</sup> although other federal legislation may reach discrimination in the sale of services.<sup>471</sup> Similarly, relatively few states have

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construction, in all likelihood, would be followed by the Minnesota court in any interpretation of the Minnesota Act. *See, e.g., State v. Duluth Bd. of Trade*, 107 Minn. 506, 517-18, 121 N.W. 395, 399 (1909). *See generally French, The Minnesota Antitrust Law*, 50 MINN. L. REV. 59, 65 (1965) (principle of construing Minnesota antitrust law harmoniously with its federal counterpart is firmly fixed). Therefore, the probable interpretation would be that subdivision 6 is violated even if sellers do not engage in a conspiracy.

466. *See* notes 462-64 *supra* and accompanying text.

467. Discriminating in the price of like commodities between two customers by a single seller, however, is one element of a Robinson-Patman Act offense. *See, e.g., FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 549 (1960) (discrimination means only that seller charged one purchaser a higher price than another for the same product); *Castlegate, Inc. v. National Tea Co.*, 34 F.R.D. 221, 229-31 (D.C. Colo. 1963) (sale by same seller to different buyers at different prices must be shown). *See generally W. PATMAN, COMPLETE GUIDE TO THE ROBINSON-PATMAN ACT* 11-12 (1964); Lamet, *Price and Service Discrimination Under Federal and State Laws*, in *ANTITRUST ADVISOR* 291, 298 (2d ed. C. Hills ed. 1978).

468. *See* note 465 *supra*.

469. *See* H.F. 340, § 1(6), 70th Minn. Legis., 1st Sess. (1977).

470. *See* Robinson-Patman Act § 1(a), 15 U.S.C. § 13(a) (1976). The term "commodities" has been construed to exclude such intangibles as real estate leases, *see Export Liquor Sales, Inc. v. Ammex Warehouse Co.*, 426 F.2d 251, 252 (6th Cir. 1970), *cert. denied*, 400 U.S. 1000 (1971), training, owning, or racing horses, *see Karlinsky v. New York Racing Ass'n*, 310 F. Supp. 937, 939 (S.D.N.Y. 1970), and licenses under patents, *see LaSalle St. Press, Inc. v. McCormick & Henderson, Inc.*, 293 F. Supp. 1004, 1006 (N.D. Ill. 1968), *aff'd on other grounds*, 445 F.2d 84 (7th Cir. 1971). Commodities have been generally defined as "tangible, physical, moveable article[s] of commerce . . ." ABA ANTITRUST SECTION, *ANTITRUST LAW DEVELOPMENTS* 112 (1975).

471. The Sherman Act, 15 U.S.C. §§ 1-7 (1976), applies equally to sales of goods and services. It has been applied, for example, to the fixing of attorney's fees, *see Goldfarb v.*

general prohibitions against discrimination in the sale of services.<sup>472</sup>

One fundamental reason can be discerned why price discrimination statutes have not been extended to reach discrimination in sales of services. Before it can be determined whether price discrimination exists, a sameness or commonality among the items being sold must be present.<sup>473</sup> Although sameness obviously exists with respect to two tangible products manufactured on the same production line,<sup>474</sup> how can it be determined that two wills,

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Virginia State Bar, 421 U.S. 773, 785-93 (1975), real estate brokers' commissions, see *United States v. National Ass'n of Real Estate Bds.*, 339 U.S. 485, 491-92 (1950), as well as other services. See *id.* at 491 (noting cases in which the Sherman Act was applied to transportation, cleaning, dyeing, medical, news and advertising services).

The Federal Trade Commission is empowered to prevent all methods of unfair competition affecting commerce. See 15 U.S.C. § 45(a) (1976). Pursuant to this power, the FTC may regulate sales of services. See, e.g., *Rushing v. FTC*, 320 F.2d 280, 282-83 (5th Cir. 1963) (FTC enforcement action against correspondence school's misleading advertisements), *cert. denied*, 375 U.S. 986 (1964).

Other federal government agencies also have power to regulate the prices charged in certain industries. See, e.g., 47 U.S.C. § 205 (1970) (Federal Communications Commission empowered to fix charges for communications industry); 49 U.S.C. § 15(1) (1970) (Interstate Commerce Commission empowered to set rates for interstate carriers).

There is, however, a dearth of cases applying federal antitrust law when the sole violation was price discrimination in the sale of services.

472. See Appendix § C. As with the federal law, state cases applying the general prohibitions against price discrimination and sales below cost to the sale of services are rare.

473. The Robinson-Patman Act prohibits discrimination in price between different purchasers of "commodities of like grade and quality." See Robinson-Patman Act § 1(a), 15 U.S.C. § 13(a) (1976). The like grade and quality requirement has caused serious problems of definition because the amount of physical similarity necessary to a finding of like commodities is not clear. Compare *FTC v. Borden Co.*, 383 U.S. 637, 641 (1966) (consumer preferences as to higher-priced public brand over lower-priced private label brand irrelevant; determination made on characteristics of product) and *Atlanta Trading Corp.*, 53 F.T.C. 565 (1956), *rev'd*, 258 F.2d 365 (2d Cir. 1958) (ham is ham without regard to consumer preference) with *Quaker Oats Co.*, 66 F.T.C. 1131 (1964) (physical difference that results in lower consumer preference sufficient for a finding of unlike commodities). It appears that the emphasis of the "like grade and quality" analysis falls on the physical differences in the products sold, see *Perma Life Mufflers, Inc. v. International Parts Corp.*, 376 F.2d 692 (7th Cir. 1967) (lifetime guarantee on one muffler but not on another not sufficient to differentiate products), *rev'd on other grounds*, 392 U.S. 134 (1968), and that a physical difference in products may be significant if it results in consumer preference for one product over another. See *Quaker Oats Co.*, 66 F.T.C. 1131, 1192 (1964). But cf. L. SULLIVAN, *supra* note 2, § 218 (like-commodity determination made on objective physical differences).

474. See, e.g., *Perma Life Mufflers, Inc. v. International Parts Corp.*, 376 F.2d 692, 702 (7th Cir. 1967) (lifetime guarantee on one muffler not sufficient to differentiate it from another muffler), *rev'd on other grounds*, 392 U.S. 134 (1968); *Pacific Eng'r & Prod. Co. v. Kerr-McGee Corp.*, 1974-1 Trade Cases (CCH) ¶ 75,054 (D. Utah 1974) (chemicals blended and sized differently not sufficiently differentiated when manufacturer and customer usage the same).



two appendectomies, or two haircuts are sufficiently similar to be comparable for price discrimination purposes? Perhaps application of price discrimination laws to the furnishing of services would simply mean that all customers must be charged the same hourly rate. However, many providers of services do not base fees solely or largely on the number of hours worked, nor do they always perform the same consistent amount of work from hour to hour.

A sometimes difficult interpretative problem under the Robinson-Patman Act has been the determination of when commodities are in fact, in the statutory words, of "like grade and quality"<sup>475</sup> to make their prices comparable for purposes of determining whether price discrimination exists.<sup>476</sup> Subdivision 6 would compound this problem by inserting the word "substantially" before the words "like grade and quality."<sup>477</sup>

Subdivision 6 also purports to apply to purchasers as well as sellers by prohibiting "the knowing solicitation or receipt" of a discriminatory price.<sup>478</sup> The Robinson-Patman Act, on the other hand, applies to purchasers only when they actually receive goods at a prohibited price.<sup>479</sup> Apparently, under proposed subdivision 6, the mere request or "solicitation" of a discriminatory price would be sufficient to constitute a violation,<sup>480</sup> although it is diffi-

475. Robinson-Patman Act § 1(a), 15 U.S.C. § 13(a) (1976).

476. See notes 473-74 *supra*.

477. See H.F. 340, § 1(6), 70th Minn. Legis., 1st Sess. (1977). The effect of qualifying the phrase with the addition of the word "substantially" is difficult to determine. In another context, the Minnesota Supreme Court has stated that "the term 'substantial' is relative and its meaning to be gauged by the circumstances." *State v. Pahl*, 254 Minn. 349, 353-54, 95 N.W.2d 85, 89 (1959) (construing "substantial" destruction of property in a condemnation proceeding). Other sources indicate that the word "substantially" has a more certain meaning. BLACK'S LAW DICTIONARY 1597 (rev. 4th ed. 1968) offers the following definition: "Essentially; without material qualification; in the main; in substance; materially; in a substantial manner." See also *id.* (definition of "substantial").

478. See H.F. 340, § 1(6), 70th Minn. Legis., 1st Sess. (1977).

479. The operative language in the Act states: "[I]t shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section." Robinson-Patman Act § 1(f), 15 U.S.C. § 13(f) (1976).

480. The word "solicitation" is defined as "the pursuit, practice, act, or instance of soliciting." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2169 (1971). "Solicit" is defined as "to make petition to . . . ; to approach with a request or plea . . . ; to move to action . . . ; to strongly urge." *Id.* The word "soliciting" has been defined as "to ask for or to request some thing or action in language which convinces that the asking or requesting is being done in earnest and that the solicitor wants results." *Bittiker v. State Bd. of Registration for the Healing Arts*, 404 S.W.2d 402, 405 (Mo. Ct. App. 1966). Because none of these definitions requires that the act requested be completed before a solicitation can be said to have occurred, it would appear that the mere asking for a discrimination in

cult to understand how the requisite potential injury to competition could exist if the discriminatory price was not in fact received.

Certain prohibitions found in the Robinson-Patman Act are omitted from subdivision 6. Specifically, no express prohibition against a seller's paying a brokerage to a buyer<sup>481</sup> nor a prohibition against a seller's furnishing promotional services or payments to its customers,<sup>482</sup> similar to those found in the Robinson-Patman Act, are contained in subdivision 6. These prohibitions in the Robinson-Patman Act have been criticized as creating in effect *per se* violations because a violation may exist despite absence of injury or probability of injury to competition.<sup>483</sup> Accordingly, these prohibitions might well be omitted from any Minnesota legislation. Less desirable, however, may be the omission from proposed subdivision 6 of a provision similar to the Non-Profit Institutions Act,<sup>484</sup> which exempts sales to nonprofit institutions from the prohibitions of the Robinson-Patman Act.<sup>485</sup> Absent a comparable provision in the Minnesota law, the subdivision 6 prohibitions arguably might apply to sales to nonprofit institutions.<sup>486</sup>

With these qualifications, subdivision 6 essentially follows the wording of the Robinson-Patman Act.<sup>487</sup> Thus, Minnesota courts probably would look to the body of federal decisions to find the meaning of the Minnesota equivalent to the Robinson-Patman Act.<sup>488</sup> The question should be asked, therefore, whether, even if

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price would be prohibited by the language of subdivision 6. See H.F. 340, § 1(6), 70th Minn. Legis., 1st Sess. (1977).

481. Compare H.F. 340, § 1(6), 70th Minn. Legis., 1st Sess. (1977) with Robinson-Patman Act, § 1(c)-(e), 15 U.S.C. § 13(c)-(e) (1976).

482. Compare H.F. 340, § 1(6), 70th Minn. Legis., 1st Sess. (1977) with Robinson-Patman Act, § 1(c), 15 U.S.C. § 13(c) (1976).

483. See, e.g., DEP'T OF JUSTICE REPORT, *supra* note 10, at 28-31; Fisher, Sections 2(D) and (E) of the Robinson-Patman Act: Babel Revisited, 11 VAND. L. REV. 453, 467-68 (1958); Miller, Sections 2(d) and (e) of the Robinson-Patman Act: Seller in a Quandary, 45 MARQ. L. REV. 511, 520-21 (1962).

484. See Non-Profit Institutions Act, ch. 283, 52 Stat. 446 (codified at 15 U.S.C. § 13(c) (1976)).

485. See *id.*

486. The statute prohibiting price discrimination in the distribution of pharmaceutical products, however, does exempt educational institutions and hospitals, among others, from the provisions of the Act. See MINN. STAT. § 151.061(1) (1976). Also of note is the absence of an exclusion for sales to governmental bodies, a provision common in other states. See Appendix §§ A.3, B.3.

487. Compare H.F. 340, § 1(6), 70th Minn. Legis., 1st Sess. (1977) with 15 U.S.C. § 13 (1976).

488. See generally French, *supra* note 465, at 65 ("principle of harmonious construction

additional price discrimination legislation is needed in Minnesota, the state needs a statute with the complexity, ambiguity, and tangled web of interpretation of the Robinson-Patman Act.<sup>489</sup>

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[with federal law] has become firmly fixed in Minnesota law").

489. For example, a violation of the Robinson-Patman Act has been found when a seller charged relatively minor differences in price to customers who purchased the product from the seller and then resold it in competition with each other. See *Purolator Prods., Inc. v. FTC*, 352 F.2d 874, 884-85 (7th Cir. 1965). If the profit margins are narrow, many Robinson-Patman Act decisions have essentially inferred the requisite probability of injury to competition resulting from the violation. See, e.g., *FTC v. Morton Salt Co.*, 334 U.S. 37, 45-49 (1948); *Beatrice Foods Co.*, 76 F.T.C. 719, 744-46 (1969), *aff'd sub nom. Kroger Co. v. FTC*, 438 F.2d 1372 (6th Cir.), *cert. denied*, 405 U.S. 871 (1971). Does Minnesota wish such a result?

Similarly, the Robinson-Patman Act essentially prohibits a seller from charging a customer lower prices than its competitors are paying when the customer buys larger quantities or volumes of goods, except to the extent that such lower prices can be cost justified. See ABA, ANTITRUST SECTION, *supra* note 470. At the same time, the cost-justification defense in the Robinson-Patman Act § 1, 15 U.S.C. § 13 (1976), which is repeated in subdivision 6 of House File 340, see H.F. 340, § 1(6), 70th Minn. Legis., 1st Sess. (1977), has been given a very narrow interpretation by the courts. See DEP'T OF JUSTICE REPORT, *supra* note 10, at 18-22. Are these rules needed in Minnesota?

By way of further example, both the Robinson-Patman Act, see 15 U.S.C. § 13(b) (1976), and subdivision 6, of House File 340, see H.F. 340, § 1(6), 70th Minn. Legis., 1st Sess. (1977), contain a defense allowing a seller to charge different prices to different customers if the seller is meeting competition. Federal courts have engaged in a continuing debate over whether the meeting competition defense is available only to sellers meeting their competitors' lawful, as opposed to unlawful, prices, compare *National Dairy Prod. Corp.*, 70 F.T.C. 79, 193-203 (1966), *rev'd*, 395 F.2d 517, 525 (7th Cir.), *cert. denied*, 393 U.S. 977 (1968) with *Cadigan v. Texaco, Inc.*, 492 F.2d 383 (9th Cir. 1974). Moreover, whether the meeting competition defense is available only to meet a competitor's individual prices or may be used to meet a competitor's entire pricing pattern also has found courts in apparent disagreement. Compare *Standard Motor Prod., Inc. v. FTC*, 265 F.2d 674, 677 (2d Cir.), *cert. denied*, 361 U.S. 826 (1959) with *Callaway Mills Co. v. FTC*, 362 F.2d 435, 441-42 (5th Cir. 1966). Should Minnesota's meeting competition defense be similarly circumscribed?

The meeting competition defense in House File 340, see H.F. 340, § 1(6), 70th Minn. Legis., 1st Sess. (1977), does not specifically require that the lower competitive price being met be "legal" if the defense is to be relied upon. See *id.* This appears to be inconsistent with provisions in the present Minnesota statutes allowing price discrimination to meet competition when the price being met is "legal." See note 110 *supra* and accompanying text.

More fundamentally, there is no attempt to relate subdivision 6 to any of the existing Minnesota prohibitions of locality price discrimination, see MINN. STAT. § 325.03 (1976); *id.* § 325.04, para. 2, and sales below cost. See *id.* § 325.04, para. 1. Consequently, the Legislature should consider seriously whether subdivision 6 should be enacted without any effort to relate it to the existing prohibitions of sections 325.03 and 325.04. Additionally, if new price discrimination legislation is to be enacted in Minnesota, the time appears ripe to evaluate the continuing need for the existing legislation.

## 2. House File 722

House File 722<sup>490</sup> was introduced on March 3, 1977,<sup>491</sup> and, like House File 340, was referred to the Committee on Commerce and Economic Development.<sup>492</sup> There also is no record of any legislative action on H.F. 722;<sup>493</sup> therefore, like H.F. 340, its purpose and effect must be discerned largely from reviewing its provisions.

Unlike H.F. 340, H.F. 722 would have been limited to a single product: motor vehicle fuel.<sup>494</sup> Nevertheless, H.F. 722 proposed

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490. The bill read, in relevant part:

Section 1. Minnesota Statutes 1976, Chapter 325, is amended by adding a section to read:

[325.813] [MOTOR VEHICLE FUEL DISCRIMINATION.] Subdivision 1. [DEFINITIONS.] For the purpose of sections 1 and 2, the terms defined in this section have the meanings given them.

Subd. 2. "Motor vehicle fuel" means all products commonly or commercially known as gasoline and diesel fuel.

Subd. 3. "Person" includes but is not limited to an individual, firm, company, association, partnership, limited partnership, foreign or domestic corporation, and any other entity.

Sec. 2. Minnesota Statutes 1976, Chapter 325, is amended by adding a section to read:

[325.814] [PRICE DISCRIMINATION.] Subdivision 1. No person doing business in this state and engaged in the production, refining or distribution of motor vehicle fuel shall directly or indirectly discriminate in price between purchasers of motor vehicle fuel of substantially like grade and quality, where the effect of such discrimination may be to lessen competition, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them, if such motor vehicle fuel is sold for use, consumption or resale within Minnesota. Price differentials equivalent to differences in the cost of production, refining or delivery are permitted. Persons doing business in this state and engaged in the production, refining, or distribution of motor vehicle fuel are free to select their own customers in bona fide transactions and not in restraint of trade. Nothing herein shall prevent price changes from time to time in response to changing conditions, affecting the market for or the marketability of the products concerned, such as, but not limited to, actual or imminent deterioration of products, distress sales under court process, or sales in good faith in discontinuance of business in the products concerned. This subdivision shall not apply to the purchase of motor vehicle fuel for its own use by the state and its political subdivisions.

Subd. 2. No person doing business in this state shall knowingly induce or receive a discrimination in price which is prohibited by subdivision 1.

H.F. 722, 70th Minn. Legis., 1st Sess. (1977) (emphasis omitted).

491. See 1 MINN. H.R. JOUR. 343 (1977).

492. See *id.*

493. See 5 MINN. H.R. JOUR. 131 (1977-1978) (indicating bill never went beyond first reading and referral to committee).

494. Compare H.F. 340, 70th Minn. Legis., 1st Sess. (1977) with H.F. 722, 70th Minn. Legis., 1st Sess. (1977). H.F. 722, § 1(2), 70th Minn. Legis., 1st Sess. (1977) defines "motor vehicle fuel" as "all products commonly or commercially known as gasoline and diesel fuel."

what would have been essentially a state Robinson-Patman Act applicable solely to that product.<sup>495</sup>

Most of the interpretative issues identified with respect to H.F. 340 also would apply to H.F. 722;<sup>496</sup> however, H.F. 722 was proposed as a new section rather than an additional subdivision of an existing section. Therefore, H.F. 722 poses additional inquiries as well. First, what is the reason for singling out motor vehicle fuel for special attention? Perhaps the bill was introduced in reaction to the perceived business failure of many gasoline filling stations.

What is the relationship of H.F. 722 to other existing law? Unlike H.F. 340, H.F. 722 specifically states that it is to be cumulative to all other laws and is not to be construed as repealing any.<sup>497</sup> The relationship between the proposed, specific law concerning motor vehicle fuel and existing Minnesota law is further obscured by the fact that legislation dealing with locality price discrimination in the production, manufacture, or distribution of petroleum products is already in existence.<sup>498</sup>

There are other respects in which H.F. 722 parts ways with H.F. 340. Unlike the Robinson-Patman Act and H.F. 340, which apply when the effect of the discrimination may be "substantially to lessen competition,"<sup>499</sup> H.F. 722 would apply when the effect of discrimination merely "may be to lessen competition."<sup>500</sup> Further, H.F. 722, unlike H.F. 340 and the Robinson-Patman Act, contains no defense for lowering prices to meet competition.<sup>501</sup> Why meeting competition should be a defense under the general act, which applies to any commodity, but not under H.F. 722, which applies only to motor vehicle fuel, is inexplicable. In short, despite its narrower reach, H.F. 722 should be approached with as much caution as H.F. 340.

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495. Compare H.F. 722, 70th Minn. Legis., 1st Sess. (1977) with 15 U.S.C. §§ 13-13b, 21a (1976).

496. See notes 456-89 *supra* and accompanying text.

497. Compare H.F. 340, 70th Minn. Legis., 1st Sess. (1977) with H.F. 722, § 2(8), 70th Minn. Legis., 1st Sess. (1977).

498. See MINN. STAT. § 325.82 (1976); notes 172-84 *supra* and accompanying text.

499. See Robinson-Patman Act § 1(a), 15 U.S.C. § 13(a) (1976); H.F. 340, § 1(6), 70th Minn. Legis., 1st Sess. (1977).

500. See H.F. 722, § 2(1) 70th Minn. Legis., 1st Sess. (1977).

501. Compare H.F. 722, 70th Minn. Legis., 1st Sess. (1977) with Robinson-Patman Act § 1(b), 15 U.S.C. § 13(b) (1976) and H.F. 340, § 1(6), 70th Minn. Legis., 1st Sess. (1977).

*C. Price Discrimination at the Federal Level: Contemporary Opposition to and Support of the Robinson-Patman Act*

Commentary on the effects of the Robinson-Patman Act obviously provides an additional source of information on the desirability of retaining existing, and accepting proposed, statutes prohibiting price discrimination and sales below cost.<sup>502</sup> However, commentary on the federal law is widely divergent with no discernable conclusion.<sup>503</sup>

Continuing adverse commentary on the Robinson-Patman Act in recent years has been offered by the Antitrust Division of the United States Department of Justice, which shares with the Federal Trade Commission the responsibility of enforcing the anti-trust laws, including the Robinson-Patman Act.<sup>504</sup> Recent expressions of the Department's views may explain why its efforts to enforce the Robinson-Patman Act have been notably lacking almost since the Act was passed.

The Justice Department's views are suggested in a speech delivered to grocery manufacturers on October 29, 1975, by Jonathan C. Rose, then acting Deputy Assistant Attorney General for the Antitrust Division.<sup>505</sup> Mr. Rose opened his speech by stating:

As you know, the Robinson-Patman Act was passed in the mid-30s. It was primarily a response to the concern of small grocers that price discounts granted by the members of your industry to the larger chain food stores placed them at a serious competitive disadvantage. Since that time, for some time the Act has become, in my view, a latter day Bill of Rights for the small businessmen of America. Consequently, very few public officials, particularly members of Congress, have had any incen-

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502. The complexity of the Robinson-Patman Act has produced evaluation and analysis by Congress, *see, e.g.*, SUBCOMM. REPORT, *supra* note 11, the Department of Justice, *see, e.g.*, DEP'T OF JUSTICE REPORT, *supra* note 10, the American Bar Association, *see, e.g.*, ABA SECTION OF ANTITRUST LAW, REPORT ON PRICE DISCRIMINATION IN NON-SALE AND NON-COMMODITY TRANSACTIONS (1973) [hereinafter cited as ABA REPORT], and commentators. *See, e.g.*, C. AUSTIN, PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT (2d rev. ed. 1959); D. BAUM, THE ROBINSON-PATMAN ACT (1964); F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT (1962 & Supp. 1964); Anonymous, *supra* note 12; Austern, *supra* note 12; Austern, *Difficult and Diffusive Decades: An Historical Plaint About the Robinson-Patman Act*, 41 N.Y.U. L. REV. 897 (1966).

503. *See* notes 508-53 *infra* and accompanying text.

504. *See* Hoegh, Ellner & Clyne, *The Federal Trade Commission and the Federal Trade Commission Act*, in ANTITRUST ADVISOR 389, 391-92 (2d ed. C. Hills ed. 1978).

505. Address by Jonathan C. Rose, Acting Deputy Assistant Attorney, General Antitrust Division, to the Legal Committee of the Grocery Manufacturers of America (Oct. 29, 1975).

tive to inquire into the actual economic impact of the Act on both large and small businesses and upon the consumer in today's economy. . . .

No other country has a statute like Robinson-Patman, except for France, and I am told that there it is not really enforced. The Act can, perhaps, be seen as a "period piece" of the Depression era. Unlike today, public officials of the 1930s were concerned about falling prices and the devastating impact of the Great Depression. Indeed, price cutting was seen by many in that era as a serious evil, and attempts were made as through the NRA Codes of Fair Competition to "stabilize" the marketplace. Today, of course, the world is much different. A primary economic concern is inflation as well as institutional structures which maintain price rigidity and thus inhibit the movement of prices in response to market forces.<sup>506</sup>

Mr. Rose then evaluated the effect of the Robinson-Patman Act, concluding:

In my personal view, outright repeal is probably the most intellectually sound and economically defensible approach. I do not believe that Robinson-Patman has had, or will have, any significant economic long-run benefits. On the other hand, the probable economic costs of Robinson-Patman are significant.<sup>507</sup>

In December of 1975, the Domestic Council Review Group on Regulatory Reform held hearings on the operation of the Robinson-Patman Act to determine whether it should be retained, modified or repealed.<sup>508</sup> Thereafter, Antitrust Division staff members prepared a comprehensive document entitled "Report on the Robinson-Patman Act,"<sup>509</sup> ultimately published in 1977.<sup>510</sup> This report represents an in-depth analysis of the Act from the viewpoint of the Department of Justice.<sup>511</sup> The report drew not only on the views expressed at hearings before the 1975 Review Group but also on views expressed at hearings held in late 1975 and early 1976 by the Ad Hoc Subcommittee on the Anti-trust Laws, the Robinson-Patman Act, and Related Matters of

506. *Id.* at 1-2.

507. *Id.* at 15.

508. See *Preface to DEP'T OF JUSTICE REPORT*, *supra* note 10. Over 20 persons testified at these hearings including members of the academic community, practicing attorneys, representatives of small business groups, business people, and present and former government officials. *Id.*

509. *DEP'T OF JUSTICE REPORT*, *supra* note 10.

510. *Id.*

511. See *Preface to DEP'T OF JUSTICE REPORT*, *supra* note 10.

the Small Business Committee of the United States House of Representatives.<sup>512</sup>

The Antitrust Division's Report first considered the effects of the Robinson-Patman Act upon competition, prices, efficiency, and the consumer.<sup>513</sup> The Act, according to the Report, has caused pricing rigidity and has encouraged competitors to discuss pricing arrangements, a possible violation of the Sherman Act.<sup>514</sup> The Report also criticized the Act as protecting highly concentrated, local markets from the entry of new competition and as discouraging buyers from engaging in hard bargaining with large sellers.<sup>515</sup> In addition, the Report indicated that the Act tends to preserve a layer of middlemen (wholesalers) even though integration of certain distribution functions might be more efficient.<sup>516</sup> The Report concluded that manufacturers and distributors are discouraged by operation of the Act from helping small businesses meet competitive challenges.<sup>517</sup>

The Report continued with a review of the economic, political, and legislative climate at the time the Act had been passed in 1936.<sup>518</sup> The economic and policy assumptions underlying the Act were then evaluated.<sup>519</sup> According to the Report, the climate at the time of passage was greatly affected by the Great Depression:

Much of the economic thought of the 1930 s [*sic*] was pre-occupied with recovery from the depression. No legislature convened during that period could ignore the catastrophic failure rate of businesses of all sizes, declining wages, and the rapid decrease of the gross national product. The disruption of economic life was such that ordinary people lost confidence in the free enterprise system; people clamored for government protection, not competition.<sup>520</sup>

A number of erroneous assumptions relied upon by the drafters of the Act were identified in the Antitrust Division's Report.<sup>521</sup> One assumption was that the general level of prices should be higher; a second, that, in the ideal world, prices to all customers

512. *Id.*

513. See DEP'T OF JUSTICE REPORT, *supra* note 10, at 8-100. But see *United States v. United States Gypsum Co.*, 98 S. Ct. 2864 (1978).

514. See *id.* at 99.

515. See *id.*

516. See *id.*

517. See *id.* at 100.

518. See *id.* at 101-13.

519. See *id.* at 149-250.

520. *Id.* at 101 (footnote omitted).

521. See *id.* at 101-39.



would be the same.<sup>522</sup> According to the Report, in the world of workable competition, variation among prices charged to individual customers is to be expected.<sup>523</sup> Further, the Report indicated that to assume that price discrimination uniformly favors larger buyers and never results in lower prices throughout the market was erroneous.<sup>524</sup> In fact, price discrimination is part of a dynamic process by which excessive price levels in oligopolistic industries are brought down to a more competitive level.<sup>525</sup> Thus, this portion of the Report concluded that compliance with the Robinson-Patman Act creates a deleterious impact upon competition without any corresponding increase in protection for small businesses.<sup>526</sup> The difficulties in the Act, the Report implied, could therefore be considered more a result of a defect in its goals than, as sometimes perceived, a result of poor drafting or improper statutory interpretation or administration.<sup>527</sup>

Possible remedies were discussed in the final chapter of the Report,<sup>528</sup> where the authors commented that "careful reconsideration of the Robinson-Patman Act is timely. . . . [S]erious consideration should be given to repealing the Robinson-Patman Act . . . ."<sup>529</sup> The Report offered two alternatives for consideration, both drafts of statutes initially suggested by the Department of Justice in 1975.<sup>530</sup> The first proposal, the Predatory Practices

522. *Id.* at 150-53. The Justice Department concluded that this assumption was inherent in the Robinson-Patman Act's structure because businesspeople need not decrease their prices to particular customers if costs or market conditions change in particular areas. *See id.*

523. *See id.* at 153.

524. *See id.* at 154.

525. *See id.* at 156. An oligopolistic market is one in which there are so few firms that, unlike the truly competitive market, a change in output by one firm will be perceived by the firm as affecting the market-wide price of the commodity. The pricing and output decisions of firms in an oligopoly are thus interdependent. Most decisions made by a firm in an oligopoly, therefore, take into account the probable reaction of the other firms in the industry. *See generally* F. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* ch. 5 (1970).

526. *See* DEP'T OF JUSTICE REPORT, *supra* note 10, at 250.

527. *See id.* at 149.

528. *See id.* at 260-69.

529. *Id.* at 260-61. Moreover, the Justice Department Report also concluded:

The simple truth is that Robinson-Patman is a false promise: it provides little, long-run protection to small businessmen. It is just not possible to legislate equality in a free market system. The basic force in changing the structure of the American marketplace is the consumer. It is the consumer who decides the type of retail establishment with which he or she wishes to deal.

*Id.* at 254.

530. *See id.* at 276-93.

Act,<sup>531</sup> would outlaw charging a price below the “reasonably anticipated average direct operating expense” when a seller supplies a customer with a commodity for a sustained period of time, unless certain defenses are met.<sup>532</sup> No discrimination would have to be proved to sustain a violation.<sup>533</sup> The proposed act was intended to protect a person from the predatory actions of his own competitors.<sup>534</sup> The second proposal, the Price Discrimination Act,<sup>535</sup> incorporated provisions of the Predatory Practices

531. The proffered legislation provided, in pertinent part:

Sec. 2. It shall be unlawful for the seller of a commodity engaged in commerce overtly to threaten a competing or potential competing seller of the commodity with economic or physical harm, so as to cause or induce the competing seller (a) to conform to pricing policies favored by the seller; or (b) to cease or refrain from selling any commodity to any particular customer; regardless or [sic] whether any overt action is taken to fulfill such threat.

Sec. 3. It shall be unlawful for a seller of a commodity, engaged in commerce, knowingly to sell on a sustained basis such commodity at a price below the reasonably anticipated average direct operating expense incurred in supplying the commodity, where such commodity is sold for use, consumption, or resale within the United States, the District of Columbia, or any other territory under the jurisdiction of the United States.

Sec. 4. It shall be a defense to a violation of Section 3 that an otherwise unlawful price:

(a) was charged by a person in order to meet in good faith an equally low price of a competitor;

(b) was charged by a new entrant, a person having at the time of sale a less than 10 percent share of the sales of the commodity in the section of the country in which the commodity was sold at such price being deemed a new entrant;

(c) was charged in response to changing conditions affecting the market for or the marketability of the commodities involved, such as but not limited to actual or imminent deterioration of perishable commodities, obsolescence of seasonal commodities, distress sales under court process, or sales in good faith in discontinuance of business in the commodities concerned; or

(d) did not clearly threaten the elimination from a line of commerce of a competitor of the person charging the otherwise unlawful price.

*Id.* at 277-78.

532. *See id.* at 262.

533. *See id.*

534. *See id.*

535. In relevant part, this proposal stated:

Sec. 2. It shall be unlawful for the seller of a commodity engaged in commerce to overtly threaten a competing or potential competing seller of the commodity with economic or physical harm, so as to cause or induce the competing seller (a) to conform to pricing policies favored by the seller or (b) to cease or refrain from selling any commodity within a geographic area or to cease or refrain from selling any commodity to any particular customer; regardless of whether any overt action is taken to fulfill such threat.

Sec. 3. It shall be unlawful for a seller of a commodity, engaged in commerce, knowingly to sell on a sustained basis such commodity at a price below the reasonably anticipated average direct operating expense incurred in supply-

## Act, but also would have prohibited price discrimination that

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ing the commodity, where such commodity is sold for use, consumption, or resale within the United States, the District of Columbia, or any other territory under the jurisdiction of the United States.

Sec. 4. It shall be a defense to a violation of Section 3 that an otherwise unlawful price:

(a) was charged by a person in order to meet in good faith an equally low price of a competitor;

(b) was charged by a new entrant, a person having at the time of sale a less than 10 percent share of the sales of the commodity in the section of the country in which the commodity was sold at such price being deemed a new entrant;

(c) was charged in response to changing conditions affecting the market for or the marketability of the commodities involved, such as but not limited to actual or imminent deterioration of perishable commodities, obsolescence of seasonable commodities, distress sales under court process, or sales in good faith in discontinuance of business in the commodities concerned; or

(d) did not clearly threaten the elimination from a line of commerce of a competitor of the person charging the otherwise unlawful price.

Sec. 5. It shall be unlawful to discriminate either directly or indirectly in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, where:

(a) the recipient of the discrimination is in competition with others not granted the discrimination, the discrimination is significant in amount, and the discrimination is part of a pattern which systematically favors larger recipients in the relevant line of commerce over their smaller competitors; or

(b) the recipient of the discrimination is in competition with others not granted the discrimination, the discrimination is significant in amount, and the discrimination clearly threatens to eliminate from a line of commerce one or more competitors of the recipient where the effect of such elimination may be substantially to lessen competition or to tend to create a monopoly in any line of commerce in any section of the country.

Sec. 6. It shall be a defense to a violation of Section 5 that the lesser price was charged in good faith to meet an equally low price of a competitor. Except in a suit seeking only prospective relief against all or substantially all of the competitors practicing the discrimination, the defense shall be allowed even if the equally low exaction of a competitor is subsequently determined to be unlawful.

Sec. 7. It shall be a defense to a violation of Section 5 that the lesser price makes an appropriate allowance for differences in the cost of manufacture, distribution, sale or delivery resulting from the different methods or quantities involved in supplying the customers in question. An allowance is appropriate where the difference in price does no more than approximate the difference in cost; where the difference in price does not exceed a reasonable estimate of the difference in cost; or where the estimated difference in cost is the result of a reasonable system of classifying transactions which is based on characteristics affecting costs of manufacture, distribution, sale or delivery, under which differences in price among classes approximate differences in cost.

Sec. 8. It shall be a defense to a violation of Section 5 that: (i) the lesser price was in response to changing conditions affecting the market for or the

“systematically favor[ed] larger recipients” or threatened to eliminate a customer’s competitor from a market when the effect may be to lessen competition.<sup>536</sup> The Report, however, did not endorse either proposal.<sup>537</sup>

The Antitrust Division’s Report was followed by a report of the Ad Hoc Subcommittee on Antitrust, the Robinson-Patman Act, and Related Matters of the Small Business Committee of the House of Representatives.<sup>538</sup> The Subcommittee’s Report, which had the approval of the full committee as well,<sup>539</sup> was issued in September of 1976.<sup>540</sup> Its conclusions, drawn in part from hearings before the Subcommittee, which had also been one source of information for the Antitrust Division’s Report,<sup>541</sup> were contrary to those of the Antitrust Division. The Subcommittee Report concluded:

1. The Robinson-Patman Act, which is an important part of the antitrust laws of the United States, should not be repealed nor emasculated nor weakened in any way whatsoever; neither should it be amended. However, in order to provide additional leverage in furtherance of the beneficent purposes of this time-

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marketability of the commodities involved, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonable goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned; or (ii) the lesser price was available, on reasonably practical conditions, to the person allegedly discriminated against.

Sec. 9. Nothing herein contained shall prevent any person from refusing to deal with any person. An offer to deal only on discriminatory terms shall, however, be treated as a completed transaction for the purpose of according relief under this Act.

Sec. 10. Section 5 of the Federal Trade Commission Act shall not be held to prohibit any discrimination in price for the sale of commodities, or the receipt of any such discrimination.

Sec. 11. An order or injunction issued to restrain or prohibit a violation of Sections 5 through 9 shall remain in effect for a limited time, stipulated at the time of entry, and reasonably related to the nature of the violation. In no case shall an order issued to enforce such sections remain in effect more than five years after the date of entry.

Sec. 12. Section 2 of the Act of October 15, 1914 (38 Stat. 730) commonly known as the Clayton Act, as amended, and Sections 1 and 3 of the Act of June 19, 1936 (49 Stat. 1528) commonly known as the Robinson-Patman Act, are hereby repealed. Any orders or decrees entered pursuant to the sections enumerated in the proceeding [sic] sentence shall expire two years after the enactment of this Act, or sooner if they so provide.

*Id.* at 280-84.

536. *Id.* at 281-82.

537. *See id.* at 272-85 (by implication).

538. SUBCOMM. REPORT, *supra* note 11.

539. *See id.* Letters of Transmittal, at III.

540. *See id.*

541. *See Preface to DEP’T OF JUSTICE REPORT, supra* note 10.

proven law, Section 3 of the Robinson-Patman Act should, by Congressional action, be included within the term "antitrust laws."

2. The Robinson-Patman Act has implemented the clearly expressed national public policy "\* \* \* that the government should aid, counsel, assist, and protect, insofar as is possible, the interests of small business concerns in order to preserve free competitive enterprise \* \* \*." Therefore, the Robinson-Patman Act must be effectively enforced by those Governmental Agencies which are charged with the duty to execute and enforce its provisions.<sup>542</sup>

The Subcommittee deplored the neglect of the Department of Justice in enforcing the Act.<sup>543</sup> More significantly, the Subcommittee criticized the recent absence of enforcement by the Federal Trade Commission,<sup>544</sup> historically the only federal agency active in seeking compliance with the Act.<sup>545</sup> In an Appendix to its Report, the Subcommittee included charts of FTC actions with regard to the Act, purporting to demonstrate a decline in enforcement.<sup>546</sup> For example, the basic prohibition against price discrimination had been the basis for the issuance of twenty-eight cease-and-desist orders in 1964 but only one in 1974 and two in 1975.<sup>547</sup> Similar declines in Federal Trade Commission enforcement of other provisions in the Act also were noted.<sup>548</sup> During the

542. SUBCOMM. REPORT, *supra* note 11, at 121.

543. See *id.* at 103-04. The Subcommittee, after being informed by a Justice Department representative that he had never brought a suit alleging a Robinson-Patman Act violation, noted in its report:

It is an elementary principle of Constitutional Law that Executive officers may not, by means of construction, orders, or otherwise alter, repeal, set at nought or disregard laws enacted by the Legislative Branch. It is the Congress that passes laws and it is the duty of the Executive Branch, through its department heads, to enforce such laws and carry out the Congressional intent and mandate.

*Id.* at 90-91 (footnote omitted).

544. See *id.* at 104. In its recommendations to the Executive Branch, the Subcommittee stated:

(1) That neither it nor any of its Departments consider nor take any action on proposals to weaken, emasculate, or repeal the Robinson-Patman Act or other provisions of Federal laws against price discrimination practices which may injure, lessen, or destroy competition.

(2) That it, through its appropriate Departments and agencies, fully and effectively enforce the Robinson-Patman Act and all antitrust laws and other statutes to aid and assist the small business sector of the American economy, and thereby comply with the express mandate of the Congress.

*Id.* at 123.

545. See Hoegh, Ellner & Clyne, *supra* note 504, at 391-92.

546. See SUBCOMM. REPORT, *supra* note 11, at 128-32.

547. See *id.* at 128.

548. See *id.* at 104.

same period, the Subcommittee remarked, the Department of Justice "was bringing *no* cases under the Robinson-Patman Act."<sup>549</sup>

Both the Antitrust Division's and the Subcommittee's reports referred to a substantial amount of legal authority throughout their respective analyses. Case law as well as the opinions of various commentators, including persons participating in the various hearings on the Act, was thoroughly noted.<sup>550</sup> The report from the Antitrust Division also utilized some census-type data to support its proposition that, despite the existence of the Robinson-Patman Act, the number of small businesses was declining,<sup>551</sup> or, at least, the position occupied by larger businesses or chain stores was accelerating.<sup>552</sup> A striking omission from both reports, however, is an extensive identification or review of any empirical studies or data demonstrating the effectiveness or ineffectiveness of the Act in achieving its objectives or supporting the alleged economic detriments resulting from the Act. Rather than relying upon systematically derived economic data, the debate on the Robinson-Patman Act emphasizes examples of single instances that are not persuasive because they do not prove industry-wide effects but appear to reflect the predilection of the particular advocate utilizing them.<sup>553</sup>

#### D. A Suggested Approach

A review of the history, development, and debate concerning price discrimination and sales-below-cost statutes suggests, at a minimum, that the Minnesota Legislature should move very deliberately in considering whether to enact any new legislation in this area. Indeed, new legislation should not be enacted in the absence of convincing empirical data demonstrating the need for and effect of the proposals. Appropriate surveys should be taken of the businesses to be restricted or benefited by any new legislation to determine whether the perceived need actually would be

549. *Id.* (emphasis in original).

550. *Cf. id.* at 6 (concluding that, as a result of the number of persons testifying and authorities relied upon, the Subcommittee Report may be the most intensive and extensive study on antitrust law Congress has ever made); DEP'T OF JUSTICE REPORT, *supra* note 10, at 308-20 (listing the witnesses, cases, statutes, and secondary authorities relied upon in preparing the Report).

551. See DEP'T OF JUSTICE REPORT, *supra* note 10, at 202-06.

552. See *id.* at 102, 132, 202-06.

553. See, e.g., SUBCOMM. REPORT, *supra* note 11, at 95-96; DEP'T OF JUSTICE REPORT, *supra* note 10, at 65, 69, 71, 73-74.

promoted. In addition, empirical studies might be sponsored by the Minnesota Legislature to determine the continued viability of the present statutes prohibiting locality discrimination and sales below cost.

Many questions require answers. For example, are businesses aware of the existence of the prohibitions? Are sellers really inhibited in their pricing practices by reason of the locality discrimination statutes? Have the prohibitions against sales below cost and the ambiguities in the available defenses inhibited sellers from reducing prices or offering bargain prices? Have sellers been discouraged from selectively lowering prices to meet competition because they did not know whether the competitor's prices were "legal"?<sup>554</sup>

How many small businesses in Minnesota need or rely upon the protection of the existing statutes? Are some businesses more vulnerable to being charged higher prices by their suppliers than others in the same or different communities? In the 1970's, have most small businesses combined their purchasing power by becoming part of franchise organizations or cooperative buying organizations?

In evaluating the need for existing or new Minnesota legislation prohibiting price discrimination or sales below cost, the Legislature also should keep in mind that even in a Minnesota completely devoid of state statutes specifically prohibiting price discrimination and sales below cost, other laws are available to prohibit such activities. First of all, as long as it remains in effect, the Robinson-Patman Act would apply to situations in which one of the two sales involved in a discriminatory transaction crosses a state line.<sup>555</sup> Price discrimination practiced by regional or national firms selling in Minnesota that injures their Minnesota competitors or customers would remain subject, to a considerable extent, to the federal prohibitions found in the Robinson-Patman Act.

Moreover, actual predatory pricing resulting in a restraint of trade, an attempt to monopolize, or actual monopolization,

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554. According to the court in *State v. Wolkoff*, 250 Minn. 504, 512, 85 N.W.2d 401, 407 (1957) (construing a sales-below-cost statute), a good faith belief that the competitor's prices were legal would, of course, be a basis sufficient for charging a lower price. See notes 365-68 *supra* and accompanying text. It is doubtful, however, whether affected sellers realize this.

555. See, e.g., *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 194-95 (1974); *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115, 119-20 (1954).

would violate sections 1 or 2 of the Sherman Antitrust Act.<sup>556</sup> The Sherman Act has a greater reach than the Robinson-Patman Act.<sup>557</sup> Under it, wholly local business restraints are prohibited if they substantially and adversely affect interstate commerce,<sup>558</sup> the Sherman Act does not require a sale to have actually crossed a state line.<sup>559</sup> It also is irrelevant under the Sherman Act whether the alleged violators actually did intend to affect interstate commerce.<sup>560</sup> Thus, some pricing practices taking place in Minnesota would be proscribed under the federal antitrust law as it presently exists.

Perhaps more important for Minnesota businesses are the provisions in the Minnesota antitrust law,<sup>561</sup> which is essentially an expanded version of the Sherman Act.<sup>562</sup> The Minnesota law has been held to conform to the federal;<sup>563</sup> therefore, federal court

556. See Sherman Act §§ 1-2, 15 U.S.C. §§ 1-2 (1976).

557. The interstate commerce requirement of the Robinson-Patman Act, for example, is more restrictively construed than the interstate commerce requirement of the Sherman Act. See *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 194-95 (1974). Compare *id.* at 198-99 (Robinson-Patman Act inapplicable when only connection to interstate commerce is sale of commodity to interstate highway contractors) with *Hospital Bldg. Co. v. Rex Hosp. Trustees*, 425 U.S. 738, 743-44 (1975) (construction of hospital addition, financed out-of-state and to be serviced with goods from out-of-state, within interstate commerce for purposes of Sherman Act) and *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 (1959) (boycott affecting only local store within purview of Sherman Act; violations are "not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy").

558. *E.g.*, *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 195 (1974); see *United States v. Women's Sportswear Mfrs. Ass'n*, 336 U.S. 460, 464 (1949) ("If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.").

559. See, *e.g.*, *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 (1959); *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293, 298 (1945) (attempt to fix price of liquor within state of Colorado prohibited under Sherman Act).

560. See, *e.g.*, *Hospital Bldg. Co. v. Rex Hosp. Trustees*, 425 U.S. 738, 745 (1975).

561. MINN. STAT. §§ 325.8011-.8028 (1976 & Supp. 1977).

562. Compare *id.* with Sherman Act §§ 1-6, 8, 15 U.S.C. §§ 1-7 (1976).

563. See *St. Marie & Son, Inc. v. Hartz Mountain Corp.*, 414 F. Supp. 71 (D. Minn. 1976) (by implication) (motion for summary judgment under state antitrust law sustained in favor of plaintiff—only federal cases cited in support). The former version of the Minnesota antitrust law, Act of Apr. 21, 1899, ch. 359, 1899 Minn. Laws 487 (repealed 1971), has been construed using federal decisions as a guide. See, *e.g.*, *Pittsburgh Plate Glass Co. v. Paine & Nixon Co.*, 182 Minn. 159, 166, 234 N.W. 453, 456 (1930); *State v. Duluth Bd. of Trade*, 107 Minn. 506, 517, 121 N.W. 395, 399 (1909). Because the current version, originally adopted in 1971, Minnesota Antitrust Law of 1971, ch. 865, 1971 Minn. Laws 1715 (current version at MINN. STAT. §§ 325.8011-.8028 (1976 & Supp. 1977)), brings the Minnesota law more in conformity with the federal law than the earlier version did, compare *id.* and Act of Apr. 21, 1899, ch. 359, 1899 Minn. Laws 487 (repealed 1971) with Sherman Act §§ 1-6, 8, 15 U.S.C. §§ 1-7 (1976), the Minnesota court most likely will continue to follow federal decisions in interpreting the present law.



interpretations of the Sherman Act should be used to interpret the state statute. Accordingly, the Minnesota antitrust law reaches price discrimination and sales below cost in extreme and predatory forms.<sup>564</sup>

When reevaluation of the price discrimination and sales-below-cost statutes of general application is completed, perhaps the result will be a guide for reevaluating the extensive number of statutes applicable to specific products. Some of these statutes probably also have been derived from the view that depressed prices, rather than inflated prices, were the prime state and national economic concern. Further, they also may be based simply on an inherent egalitarian, not economic, feeling that something may be wrong if a seller is not charging all its customers the same price. This feeling apparently is still prevalent today, as the 1977 "beer statute" indicates.<sup>565</sup> Perhaps a study of the actual effects of the newly enacted beer statute's prohibition against price discrimination would be one place to begin an assessment of the effects of price discrimination statutes.

Continued presence of an egalitarian approach to price discrimination is illustrated by the fact that proponents of uniform pricing still exist not only in Minnesota but also in other jurisdictions. Recently, for example, the United States Supreme Court upheld legislation favoring the concept. In *Exxon Corp. v. Governor of Maryland*,<sup>566</sup> the Court upheld a Maryland statute requiring petroleum companies to give uniform discounts to dealers against a challenge that the Robinson-Patman Act had preempted the state statute.<sup>567</sup> In its opinion, the Court offered the following insights into the purposes of such legislation and its relationship to other antitrust law:

This Court is generally reluctant to infer pre-emption, . . . and it would be particularly inappropriate to do so in this case because the basic purposes of the state statute and the Robinson-Patman Act are similar. *Both reflect a policy choice favoring the interest in equal treatment of all customers over the interest in allowing sellers freedom to make selective competitive decisions.*

Appellants [the oil companies] point out that the Robinson-

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564. See generally L. SULLIVAN, *supra* note 2, § 43, at 108-09; Areeda & Turner, *supra* note 115, at 697-700, 724-28.

565. See notes 224-26 *supra* and accompanying text.

566. 98 S. Ct. 2207 (1978).

567. *Id.* at 2217-18.

Patman Act itself may be characterized as an exception to, or a qualification of, the more basic national policy favoring free competition, and argue that the Maryland statute "undermines" the competitive balance that Congress struck between the Robinson-Patman and the Sherman Acts. This is merely another way of stating that the Maryland statute will have an anticompetitive effect. In this sense, there is a conflict between the statute and the central policy of the Sherman Act—our "charter of economic liberty." . . . Nevertheless, this sort of conflict cannot itself constitute a sufficient reason for invalidating the Maryland statute. For if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed. We are, therefore, satisfied that neither the broad implications of the Sherman Act nor the Robinson-Patman Act can fairly be construed as a congressional decision to pre-empt the power of the Maryland Legislature to enact this law.<sup>568</sup>

In the event the Minnesota Legislature finds it desirable to have statutes specifically prohibiting price discrimination and sales below cost, steps should be taken to resolve the many ambiguities created by the present statutes. For example, the Legislature should clarify the interrelationship between the overlapping prohibitions against locality discrimination contained in sections 325.03 and 325.04 of the general act.<sup>569</sup> In addition, the Legislature should explain the interrelationship among the general prohibitions and the prohibitions applicable to specific products.<sup>570</sup>

If price discrimination and sales-below-cost statutes are deemed appropriate, the Legislature also should consider the effectiveness of the present prohibitions. Section 325.03 may in effect be a nullity because it permits an allowance for differences in quantities<sup>571</sup> and therefore probably can be easily avoided. Also, the competitive injury test by which an unlawful discrimination or sale below cost is established—purpose or effect of injuring a competitor or destroying competition<sup>572</sup>—may be so subjective and demanding as to render the prohibitions a nullity. Furthermore, the prohibitions also are weakened by the absolute

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568. *Id.* (footnotes omitted) (emphasis added).

569. See notes 65-115 *supra* and accompanying text.

570. See notes 239-47 *supra* and accompanying text.

571. See notes 99-106 *supra* and accompanying text.

572. See notes 34-37, 54-55, 76-79, 130-32 *supra* and accompanying text.

exemption for a vendor who sells at a price at least fifteen percent above the price at which he purchased the commodity.<sup>573</sup>

## V. CONCLUSION

Existing Minnesota statutes prohibiting price discrimination and sales below cost are complex and ambiguous. The basic statutes were enacted in an era when social and economic concerns were widely divergent from those of the present day.<sup>574</sup> Great caution should be exercised in enacting any further Minnesota laws prohibiting price discrimination and sales below cost. Any new legislation must be rationalized with existing legislation, already duplicative if not inconsistent. These concerns are particularly applicable if the proposed new legislation is modeled after the Robinson-Patman Act, which became law in 1936 during the same era in which the existing basic prohibitions were enacted in Minnesota.

The current debate on the federal level concerning the continued desirability of the Robinson-Patman Act should signal a need for evaluation of existing Minnesota legislation. Prohibitions of general application and prohibitions applicable to specific products should be reexamined. Fundamental to this evaluation should be empirical data on the actual effects that have been experienced under the present laws and would be experienced under any proposed laws. Whether the Sherman Act in conjunction with the Minnesota antitrust law is sufficiently broad to reach anticompetitive forms of pricing—without the need for specific, more rigid prohibitions directed against locality price discrimination and sales below cost—should be asked and answered. In short, the necessity for reevaluation is clear. Hopefully, this Article has suggested the direction that reevaluation should take.

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573. See notes 155-61 *supra* and accompanying text.

574. See notes 426-53 *supra* and accompanying text.

**APPENDIX: STATUTORY PROVISIONS IN OTHER STATES**

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**A. Price Discrimination: General Prohibitions**

The statutes collected in this section contain prohibitions against discriminating in price among different purchasers in different localities. The prohibitions apply to any commodities or merchandise with no particular item being singled out for special treatment. More than half of the states have enacted such statutes.

**1. ANTICOMPETITIVE PURPOSE OR EFFECT**

The practice prohibited by these statutes is price discrimination that has a particular purpose or result: injuring competition. The statutes can be divided into three groups according to the method by which the injury to competition is effected.

### *a. Effect of Injuring Competition*

In some states, price discrimination is prohibited solely on the basis that it has had the effect of injuring competition. The intent or purpose of the person engaging in the prohibited practice is irrelevant in establishing a violation. The following statutes fit this description.

CONN. GEN. STAT. ANN. § 35-45 (West Cum. Supp. 1978).

IDAHO CODE § 48-202(a) (1977).

MD. COM. LAW CODE ANN. § 11-204(a) (1975).

MISS. CODE ANN. § 75-21-3 (1972).

OR. REV. STAT. § 646.040 (1977).

UTAH CODE ANN. § 13-5-3 (1953).

VA. CODE § 59.1-9.7(a) (Cum. Supp. 1978).

P.R. LAWS ANN. tit. 10, § 263 (Cum. Supp. 1975).

### *b. Purpose to Injure Competition*

The majority of states prohibiting price discrimination require the person engaging in the prohibited activity to have as a purpose injuring competition. In the following states, if the requisite intent to injure competition is present, it is irrelevant in establishing a violation whether the price discrimination did in fact have the effect of injuring competition.

ARK. STAT. ANN. § 70-301 (1957).

CAL. BUS. & PROF. CODE § 17040 (West 1964).

COLO. REV. STAT. § 6-2-103 (1973).

DEL. CODE ANN. tit. 6, § 2504 (1974).

FLA. STAT. ANN. § 540.01(1) (West 1972).

HAWAII REV. STAT. § 481-1 (1976).

IOWA CODE ANN. § 551.1 (West 1950).

KAN. STAT. ANN. § 50-149 (1976).

KY. REV. STAT. § 365.020 (1970).

LA. REV. STAT. ANN. § 51:331 (West 1965).

MICH. COMP. LAWS ANN. § 445.701b (West Cum. Supp. 1978-1979).

MONT. REV. CODES ANN. § 51-507 (Cum. Supp. 1977).

NEB. REV. STAT. § 59-501 (1974).

N.M. STAT. ANN. § 49-11-3(A) (1953).

N.C. GEN. STAT. § 75-5(c)(5) (1975).

N.D. CENT. CODE § 51-09-01 (1974).

OKLA. STAT. ANN. tit. 79, § 81 (West 1976).

S.D. CODIFIED LAWS ANN. § 37-1-4 (1977).

WASH. REV. CODE ANN. § 19.90.020 (1978).

WIS. STAT. ANN. § 133.17 (West 1974).

WYO. STAT. § 40-4-106 (1977).

*c. Purpose and Effect of Injuring Competition*

In only one state, the prohibition against price discrimination requires both that the person engaging in the prohibited practice have intended to injure competition and that the effect of the prohibited conduct has been to injure competition.

MICH. COMP. LAWS ANN. § 445.701a (West Cum. Supp. 1978-1979).

2. LOCALITY OF DISCRIMINATION

The following statutes require that the price discrimination occur in different localities. Indicated parenthetically are the terms used by the statute to describe the locality.

ARK. STAT. ANN. § 70-301 (1957) ("different locations in . . . sections, communities, cities or portions thereof").

CAL. BUS. & PROF. CODE § 17031 (West 1964) (same as Arkansas).

COLO. REV. STAT. § 6-2-103 (1973) (same as Arkansas).

DEL. CODE ANN. tit. 6, § 2504 (1974) ("different sections, communities, or cities of this State . . . or any portion thereof").

FLA. STAT. ANN. § 540.01(1) (West 1972) ("different sections, communities, or cities").

HAWAII REV. STAT. § 481-1 (1976) ("different sections, communities, or cities, or portions thereof, or . . . different locations in such sections, communities, cities, or portions").

IDAHO CODE § 48-202(a) (1977) ("different locations in . . . sections, communities, cities or portions thereof").

IOWA CODE ANN. § 551.1 (West 1950) ("different sections, localities, communities, cities, or towns").

KAN. STAT. ANN. § 50-149 (1976) ("different sections, communities, or cities . . . or any portion thereof").

KY. REV. STAT. § 365.020(1) (1970) ("different sections, communities or cities, or portions thereof or locations therein").

LA. REV. STAT. ANN. § 51:331 (West 1965) ("different sections, communities, cities, or localities").

MICH. COMP. LAWS ANN. § 445.701b (West Cum. Supp. 1978-1979) ("any part of this state").

MISS. CODE ANN. § 75-21-3 (1972) ("place in the state").

MONT. REV. CODES ANN. § 51-507 (Cum. Supp. 1977) ("different localities in this state").

NEB. REV. STAT. § 59-501 (1974) (same as Florida).

N.M. STAT. ANN. § 49-11-3(A) (1953) (same as Florida).

N.C. GEN. STAT. § 75-5(b)(5) (1975) ("at a place where there is competition").

N.D. CENT. CODE § 51-09-01 (1974) (same as Florida).

OKLA. STAT. ANN. tit. 79, § 81 (West 1976) (same as Florida).

OR. REV. STAT. § 646.040(1) (1977) ("sections, communities or cities

or portions thereof or between different locations in sections, communities, cities or portions thereof").

S.D. CODIFIED LAWS ANN. § 37-1-4 (1977) (same as Florida).

WASH. REV. CODE ANN. § 19.90.020 (1978) ("different sections of the same community, city, town, or village").

WIS. STAT. ANN. § 133.17 (West 1974) ("sections, communities, or cities . . . or any portion thereof").

WYO. STAT. § 40-4-106 (1977) ("sections, communities or cities or portions thereof").

### 3. EXEMPTIONS AND JUSTIFICATIONS

Not every sale that appears to effect a discrimination in price violates the statutory prohibitions. Certain exemptions and justifications for charging different prices are available. Common among the states are the following:

- a. Making allowance for differences in the costs of transportation;
- b. Making allowance for differences in grade or quality;
- c. Meeting in good faith a competitor's price;
- d. Making allowance for different quantities;
- e. Making allowance for differences in the costs of manufacture;
- f. Closing out certain stocks of, for example, damaged, seasonal, or perishable goods;
- g. Engaging in liquidation sales;
- h. Selling pursuant to court order;
- i. Selecting one's customers.

Set forth below are the statutes that make provision for these exemptions and justifications. Following each citation, the particular exemption or justification is indicated with reference to the above list. Less common exemptions and justifications are also indicated.

ARK. STAT. ANN. § 70-301 (1957), (*a, b, c, d*).

CAL. BUS. & PROF. CODE §§ 17040-17042, 17050 (West 1964) (*a, b, c, d, e, f, g, h, i*; classifying customers as broker, wholesaler, jobber, or retailer); *id.* § 17024 (products and services of publicly-owned utilities).

COLO. REV. STAT. § 6-2-103 (1973) (*a, b, c, d*; sales to regulated public utilities).

CONN. GEN. STAT. ANN. § 35-45 (West Cum. Supp. 1978) (*a, b, c, d, e, f, g, h, i*).

DEL. CODE ANN. tit. 6, § 2504 (1974) (*a, b*).

FLA. STAT. ANN. § 540.01(1) (West 1972) (*a, b, c*).

HAWAII REV. STAT. § 481-1 (1976) (*a, b, c, d*; leases of motion pictures; classifications of rates by public utilities).

IDAHO CODE § 48-202 (1977) (*a, b, c, e, f, g, h, i*).

IOWA CODE ANN. § 551.1 (West 1950) (*a, b, c*; commodities subject to government regulation); *id.* § 551.11 (sales to government).

KAN. STAT. ANN. § 50-149 (1976) (*a*).

KY. REV. STAT. § 365.020 (1970) (*a, b, c*; leases of motion pictures; classifications by public utilities).

LA. REV. STAT. ANN. § 51:331 (West 1965) (*a, b*).

MD. COM. LAW CODE ANN. § 11-204 (1975 & Cum. Supp. 1978) (*a, b, c, e, f, g, h, i*; employee discounts).

MICH. COMP. LAWS ANN. §§ 445.701c-.701d (West Cum. Supp. 1978-1979) (*a, c, d, e, f, h, i*; temporary sales to foster competition).

MISS. CODE ANN. § 75-21-3 (1972) (*a, e*).

MONT. REV. CODES ANN. § 51-507 (Cum. Supp. 1977) (*b, c, d, e*).

NEB. REV. STAT. § 59-501 (1974) (*a, b*).

N.M. STAT. ANN. §§ 49-11-3(B) to -4 (1953) (*a, c, d, e, f, i*).

N.C. GEN. STAT. § 75-5(b)(6) (1975) (*a, e*).

N.D. CENT. CODE § 51-09-01 (1974) (*a, e*).

OKLA. STAT. ANN. tit. 79, § 81 (West 1976) (*a*); *see id.* § 85 (*b, c* for combinations of sellers).

OR. REV. STAT. §§ 646.040-.050 (1977) (*a, b, c, e, f, g, h, i*).

S.D. CODIFIED LAWS ANN. § 37-1-4 (1977) (*b* for discrimination by sellers); *id.* §§ 37-1-5 to -6 (*a, b, c* for discrimination by buyers); *id.* § 37-1-3.5 (services of public utilities).

UTAH CODE ANN. § 13-5-3 (1953) (*a, c, d, e, f, g, h, i*).

WASH. REV. CODE ANN. §§ 19.90.020, .070 (1978) (*a, b, c, d, e, f, g, h, i*; classifications as broker, jobber, retailer, or wholesaler; services of public utilities).

WYO. STAT. §§ 40-4-101, -106 (1977) (*a, b, c, d*; proper commercial discounts).

P.R. LAWS ANN. tit. 10, § 263 (Cum. Supp. 1975) (*a, c, d, e*).

#### 4. REMEDIES AND PENALTIES

Violations of price discrimination laws carry various sanctions. In this section, the remedies provided by the statutes are presented.

##### *a. Criminal Penalties*

Most commonly, violations are redressed by the imposition of criminal penalties in the form of fines or terms of imprisonment. Cited below are the statutes that establish the criminal sanctions with an indication of the form of the penalty.

ARK. STAT. ANN. § 70-311 (1957) (fine between \$100 and \$1,000; up to six months imprisonment; or both).

CAL. BUS. & PROF. CODE § 17100 (West 1964) (fine between \$100 and \$1,000; up to six months imprisonment; or both).

COLO. REV. STAT. § 6-2-116 (1973) (fine between \$100 and \$1,000; up to six months imprisonment; or both).

DEL. CODE ANN. tit. 6, § 2504 (1974) (fine between \$200 and \$5,000; up to one year imprisonment; or both).



FLA. STAT. ANN. § 540.06 (West 1972) (fine up to \$1,000; imprisonment up to one year).

IOWA CODE ANN. § 551.4 (West Cum. Supp. 1978) (serious misdemeanor).

KAN. STAT. ANN. § 50-150 (1976) (fine up to \$5,000; imprisonment up to one year; or both).

LA. REV. STAT. ANN. § 51:332 (West 1965) (fine between \$500 and \$5,000; imprisonment for between one and two years; or both).

MICH. COMP. LAWS ANN. § 445.707 (West 1967) (fine of \$50 per day for each day of continuing violation).

MISS. CODE ANN. § 75-21-7 (1972) (fine between \$100 and \$2,000 for each month of violation).

MONT. REV. CODES ANN. § 51-524 (Cum. Supp. 1977) (fine between \$100 and \$1,000; up to six months imprisonment; or both).

NEB. REV. STAT. § 59-505 (1974) (fine between \$500 and \$5,000; imprisonment up to one year; or both).

N.C. GEN. STAT. § 75-6 (1975) (fine of at least \$1,000; imprisonment for misdemeanor; or both).

N.D. CENT. CODE § 51-09-02 (Supp. 1977) (class A misdemeanor).

OKLA. STAT. ANN. tit. 79, §§ 81, 83 (West 1976) (fine between \$100 and \$500).

OR. REV. STAT. § 646.990 (1977) (fine between \$100 and \$500; up to six months imprisonment; or both).

S.D. CODIFIED LAWS ANN. § 37-1-7 (Supp. 1978) (class 6 felony); *id.* § 37-1-14.2 (civil penalty up to \$50,000 and other relief obtainable in action by state attorney general).

UTAH CODE ANN. § 13-5-15 (1953) (fine between \$100 and \$299; up to six months imprisonment; or both).

VA. CODE § 59.1-9.11 (Cum. Supp. 1978) (civil penalty of up to \$100,000 for willful or flagrant violation).

WASH. REV. CODE ANN. § 19.90.100 (1978) (fine between \$100 and \$1,000; up to six months imprisonment; or both).

WIS. STAT. ANN. §§ 133.17(2), .18(2) (West 1974) (fine between \$200 and \$5,000; up to one year imprisonment; or both).

WYO. STAT. § 40-4-104 (1977) (up to \$5,000 fine; up to one year imprisonment; or both); *id.* § 40-4-115 (fine between \$100 and \$1,000; up to six month imprisonment; or both, for discrimination between localities).

P.R. LAWS ANN. tit. 10, §§ 265-266 (Cum. Supp. 1975) (corporate officers personally liable for fines between \$2,500 and \$25,000; other persons liable for fines between \$5,000 and \$50,000, up to one year imprisonment, or both).

### *b. Civil Remedies*

Violations may also result in civil liability. Statutes commonly provide for injunctive relief and for treble damages. Set forth below are the various statutes providing for private civil relief.

ARK. STAT. ANN. § 70-310 (1957) (injunction, treble damages).

CAL. BUS. & PROF. CODE §§ 17070, 17078-17079, 17082 (West 1964) (injunction, treble damages, costs and attorney's fees).

COLO. REV. STAT. § 6-2-111 (1973) (injunction, damages).

CONN. GEN. STAT. ANN. §§ 35-34 to -35 (West Cum. Supp. 1978) (injunction, treble damages).

HAWAII REV. STAT. § 481-10 (1976) (injunction, treble damages).

IDAHO CODE § 48-204 (1977) (injunction, treble damages, attorney's fees).

KY. REV. STAT. § 365.070(1) (1970) (injunction, treble damages).

MD. COM. LAW CODE ANN. § 11-209(b) (1975) (injunction, treble damages, costs and attorney's fees).

MICH. COMP. LAWS ANN. § 445.711 (West Cum. Supp. 1978-1979) (injunction, actual damages, costs and attorney's fees).

MISS. CODE ANN. § 75-21-9 (1972) (civil penalty of \$500, damages).

MONT. REV. CODES ANN. § 51-521 (Cum. Supp. 1977) (injunction, treble damages).

N.M. STAT. ANN. § 49-11-8 (1953) (injunction, treble damages).

N.C. GEN. STAT. §§ 75-16 to -16.1 (1975) (treble damages, attorney's fees).

OR. REV. STAT. § 646.140 (1977) (injunction, treble damages, costs and attorney's fees).

S.D. CODIFIED LAWS ANN. § 37-1-14.3 (1977) (injunction, treble damages, costs and attorney's fees).

UTAH CODE ANN. § 13-5-14 (1953) (injunction, treble damages).

VA. CODE § 59.1-9.12 (Cum. Supp. 1978) (injunction, damages, costs and attorney's fees; treble damages for willful violations).

WASH. REV. CODE ANN. § 19.90.090 (1978) (injunction, damages).

WIS. STAT. ANN. § 133.20 (West 1974) (injunction).

WYO. STAT. § 40-4-114 (1977) (injunction, damages for price discrimination between localities).

P.R. LAWS ANN. tit. 10, § 268 (Cum. Supp. 1975) (treble damages, costs and attorney's fees).

### *c. Ouster*

Frequently, statutes provide for the forfeiture of the right to do business in the state upon a violation of the price discrimination laws. In the following states, forfeiture or ouster is an additional remedy.

ARK. STAT. ANN. § 70-308 (1957) (ouster after third violation).

CONN. GEN. STAT. ANN. § 35-36a (West Cum. Supp. 1978) (forfeiture of charter rights and privileges; dissolution).

FLA. STAT. ANN. §§ 540.04-.05 (West 1972) (revocation of permit to do business; ouster for violation after revocation).

HAWAII REV. STAT. § 481-8 (1976) (forfeiture of charter or franchise after third violation).

IOWA CODE ANN. §§ 551.8-.9 (West 1950) (ouster, revocation of license to do business).

KAN. STAT. ANN. § 50-150 (1976) (ouster for continuing violations).

LA. REV. STAT. ANN. §§ 51:335-:336 (West 1965) (revocation of permit to do business; suit to oust following revocation).

MD. COM. LAW CODE ANN. § 11-209(a)(3) (1975) (termination of right to do business).

MICH. COMP. LAWS ANN. § 445.702 (West 1967) (forfeiture of privileges; dissolution).

MISS. CODE ANN. § 75-21-9 (1972) (forfeiture of charter and right to do business).

MONT. REV. CODES ANN. § 51-523 (Cum. Supp. 1977) (ouster or revocation after third violation).

NEB. REV. STAT. § 59-508 (1974) (ouster if injunction violated).

N.D. CENT. CODE §§ 51-09-04 to -05 (1974) (revocation of charter or license to do business).

OKLA. STAT. ANN. tit. 79, § 82 (West 1976) (revocation of charter or permit; injunction against doing business).

WIS. STAT. ANN. § 133.20 (West 1974) (revocation of charter or permit to do business).

WYO. STAT. §§ 40-4-102 to -103, -112 (1977) (revocation of charter or permit to do business).

## 5. BUYER DISCRIMINATION

Most of the state statutes dealing with price discrimination are directed exclusively against discrimination in selling. In a few states, however, prohibitions against discrimination by purchasers have been enacted. These express prohibitions against buyer discrimination are found in the following statutes:

IOWA CODE ANN. § 551.2 (West 1950).

KAN. STAT. ANN. § 50-149 (1976).

MISS. CODE ANN. § 75-21-3 (1972).

MONT. REV. CODES ANN. § 51-508 (Cum. Supp. 1977).

NEB. REV. STAT. § 59-503 (1974).

N.M. STAT. ANN. § 49-11-6(B)-(C) (1953).

S.D. CODIFIED LAWS ANN. § 37-1-5 (1977).

WIS. STAT. ANN. § 133.18 (West 1974).

## 6. BUYER LIABILITY

Buyers may find themselves held liable not only for engaging in a discriminatory practice, as the statutes cited in A.5. BUYER DISCRIMINATION indicate, but also for receiving a discriminatory price when they knew the price was discriminatory. The following statutes prohibit the receipt of such a discriminatory price.

N.M. STAT. ANN. § 49-11-6(C) (1953).

OR. REV. STAT. § 646.090 (1977).

UTAH CODE ANN. § 13-5-3(f) (1953).

VA. CODE § 59.1-9.7(f) (Cum. Supp. 1978).

P.R. LAWS ANN. tit. 10, § 263(d) (Cum. Supp. 1975).

## B. Sales Below Cost: General Prohibitions

Nearly half of the states have enacted statutes prohibiting selling below cost. Significant elements in these statutes are the provisions requiring an anticompetitive intent or effect to establish a violation, describing the method of computing cost, outlining the exemptions and justifications to a violation, and prescribing the remedies and penalties. This section of the Appendix collects the citations to these provisions in sales-below-cost statutes.

### 1. ANTICOMPETITIVE PURPOSE OR EFFECT

Like the price discrimination statutes, the sales-below-cost statutes usually require that the seller act with an anticompetitive intent before the prohibition becomes operative. In a few states, however, an anticompetitive effect is all that is necessary. Set forth below are the operative sections of state sales-below-cost statutes. Following each citation is an indication whether the statute requires intent or merely effect.

ARIZ. REV. STAT. ANN. § 44-1464 (West 1967) (intent or effect).

ARK. STAT. ANN. § 70-303 (1957) (intent and purpose).

CAL. BUS. & PROF. CODE § 17043 (West 1964) (purpose); *id.* §§ 17030, 17044 (purpose or effect for violation of loss leader prohibition).

COLO. REV. STAT. § 6-2-105(1) (1973) (purpose).

HAWAII REV. STAT. § 481-3 (1976) (intent).

IDAHO CODE § 48-404 (1977) (intent or effect).

KY. REV. STAT. § 365.030(1) (1970) (purpose).

LA. REV. STAT. ANN. § 51:422(A) (West 1965) (intent or effect).

ME. REV. STAT. ANN. tit. 10, § 1204-A (Cum. Supp. 1978-1979) (purpose or effect for "any person engaged in distribution"); *id.* § 1207 (1964) (intent for retailers and wholesalers).

MD. COM. LAW CODE ANN. § 11-404(a) (1975) (intent).

MASS. GEN. LAWS ANN. ch. 93, § 14F (West 1972) (intent).

MONT. REV. CODES ANN. § 51-509 (Cum. Supp. 1977) (purpose).

N.D. CENT. CODE § 51-10-03 (1974) (intent or effect).

OKLA. STAT. ANN. tit. 15, § 598.3 (West 1966) (intent and purpose).

PA. STAT. ANN. tit. 73, § 213 (Purdon 1971) (intent or result).

R.I. GEN. LAWS § 6-13-3 (1969) (intent).

S.C. CODE § 39-3-150 (1976) (intent or purpose).

TENN. CODE ANN. § 69-109 (1976) (intent and purpose for manufacturers); *id.* § 69-303 (intent or effect for retailers and wholesalers).

TEX. BUS. & COM. CODE ANN. § 15.33(b)(2) (Vernon 1968) (intent).

UTAH CODE ANN. § 13-5-7(a) (1953) (intent and purpose).  
 VA. CODE § 59.1-14 (1973) (intent).  
 WASH. REV. CODE ANN. § 19.90.040 (1978) (purpose).  
 W. VA. CODE § 47-11A-1 (1976) (purpose).  
 WIS. STAT. ANN. § 100.30(3) (West 1973) (intent or effect).  
 WYO. STAT. § 40-4-107 (1977) (purpose).

## 2. COMPUTATION OF COSTS

The definition of cost in a sales-below-cost statute is, of course, a critical provision. Virtually every state with a sales-below-cost prohibition defines cost with reference to the costs of raw materials, labor, and overhead. In addition, nearly every such state defines distribution cost as invoice or replacement cost (whichever is lower), less noncash customary discounts, plus the cost of doing business. Definitions of the cost of doing business are usually expressed in terms of a percentage or markup above the seller's product cost (generally invoice or replacement cost). Collected below are the state statutes that compute the cost of doing business by such percentages. Indicated parenthetically following each citation is the percentage above product cost presumed to be the cost of doing business.

ARIZ. REV. STAT. ANN. § 44-1461(A) (West 1967) (12% for retailers).  
 CAL. BUS. & PROF. CODE § 17026 (West Cum. Supp. 1978) (6% for distributors).  
 HAWAII REV. STAT. § 481-3 (1976) (6% for distributors).  
 IDAHO CODE § 48-403 (1977) (6% for retailers; 2% for wholesalers).  
 LA. REV. STAT. ANN. § 51:421(F)-(G) (West 1965) (6% for retailers; 2% for wholesalers).  
 ME. REV. STAT. ANN. tit. 10, § 1202(1)-(2) (1964) (6% for retailers; 2% for wholesalers).  
 MD. COM. LAW CODE ANN. § 11-401(b)-(c) (1975) (5% for retailers; 2% for wholesalers).  
 MASS. GEN. LAWS ANN. ch. 93, § 14E (West 1972) (6% for retailers; 2% for wholesalers).  
 OKLA. STAT. ANN. tit. 15, § 598.2(a) (West 1966) (6% for retailers).  
 PA. STAT. ANN. tit. 73, § 212 (Purdon 1971) (4% for retailers; 2% for wholesalers).  
 R.I. GEN. LAWS § 6-13-1 (1969) (6% for retailers; 2% for wholesalers).  
 TENN. CODE ANN. § 69-302 (1976) (6% for retailers).  
 UTAH CODE ANN. § 13-5-7(b)(3) (1953) (6% for retailers).  
 VA. CODE § 59.1-11 (1973) (6% for retailers; 2% for wholesalers).  
 W. VA. CODE § 47-11A-6 (1976) (7% for retailers; 2% for wholesalers).  
 WIS. STAT. ANN. § 100.30(2)(a)-(b) (West 1973) (6% for retailers; 3% for wholesalers).

### 3. EXEMPTIONS AND JUSTIFICATIONS

Not every sale below cost is proscribed by the statutory prohibitions. Certain exemptions and justifications are available. Common among the states are the following:

- a. Closing out certain stocks of, for example, damaged, seasonal, or perishable goods;
- b. Selling pursuant to court order;
- c. Meeting in good faith a competitor's price;
- d. Engaging in liquidation sales;
- e. Selling to charities or relief organizations;
- f. Selling to governmental bodies;
- g. Engaging in isolated transactions of sales at less than cost.

Set forth below are the statutes that make provision for these exemptions and justifications. Following each citation, the particular exemption or justification is indicated with reference to the above list. Less common exemptions and justifications are also noted.

- ARIZ. REV. STAT. ANN. § 44-1463 (West 1967) (a, b, c, d, e, f).  
ARK. STAT. ANN. § 70-306 (1957) (a, b, c, d).  
CAL. BUS. & PROF. CODE § 17050 (West 1964) (a, b, c).  
COLO. REV. STAT. § 6-2-110 (1973) (a, b, c).  
HAWAII REV. STAT. § 481-6 (1976) (a, b, c; sales pursuant to U.S. army or naval regulations).  
IDAHO CODE § 48-407 (1977) (a, b, c, d, f).  
KY. REV. STAT. § 365.040 (1970) (a, b, c, d).  
LA. REV. STAT. ANN. § 51:426 (West 1965) (a, b, c, d, e, f; sales by manufacturers or producers).  
ME. REV. STAT. ANN. tit. 10, § 1203 (1964) (a, b, c, d, e, f, g).  
MD. COM. LAW CODE ANN. § 11-402 (1975) (a, b, c, d, e, f).  
MASS. GEN. LAWS ANN. ch. 93, § 14G (West 1972) (a, b, c, d, e, f, g).  
MONT. REV. CODES ANN. § 51-513 (Cum. Supp. 1977) (a, b, c, d, f).  
N.D. CENT. CODE § 51-10-07 (1974) (a, b, c, d, e, f).  
OKLA. STAT. ANN. tit. 15, §§ 598.6-.7 (West 1966) (a, b, c, d, e, f; bona fide auction sales).  
PA. STAT. ANN. tit. 73, § 216 (Purdon 1971) (a, b, c, d, e, f; sales to employees of trade equipment).  
R.I. GEN. LAWS § 6-13-5 (1969) (a, b, d, e, f, g).  
TENN. CODE ANN. § 69-304 (1976) (a, b, c, d, e, f, g).  
UTAH CODE ANN. § 13-5-12 (1953) (a, b, c).  
VA. CODE § 59.1-20 (1973) (a, b, c, d, e, f; sales by one wholesaler or retailer to another for purposes of accommodation).  
WASH. REV. CODE ANN. § 19.90.070 (1978) (a, b, c).  
W. VA. CODE § 47-11A-8 (1976) (a, b, c, e, f).  
WIS. STAT. ANN. § 100.30(6) (West 1973) (a, b, c, d, e, f).  
WYO. STAT. § 40-4-110 (1977) (a, b, c, d).

#### 4. REMEDIES AND PENALTIES

Violations of sales-below-cost prohibitions carry various sanctions. Categorized below are the statutes imposing the remedies and penalties. In a few states, the sanctions that may be imposed for violating the sales-below-cost prohibitions are contained in the same sections in which sanctions against price discrimination violations are described. For these few states, the reader is referred to the previous section outlining state price discrimination laws for the full citation and indication of the sanctions.

##### *a. Criminal Penalties*

The most common sanctions imposed for selling below cost are criminal penalties in the form of fines and terms of imprisonment. The statutes below describe the criminal penalties a violator of a sales-below-cost statute may face. Following each citation is an indication of the nature of the penalty.

ARIZ. REV. STAT. ANN. § 44-1466(A) (West Cum. Supp. 1978) (petty offense).

ARK. STAT. ANN. § 70-311 (1957) (fine between \$100 and \$1,000; up to six months imprisonment; or both).

CALIFORNIA: same as in A.4.

COLORADO: same as in A.4.

IDAHO CODE § 48-405 (1977) (up to \$500 fine; six months imprisonment; or both).

LA. REV. STAT. ANN. § 51:423 (West 1965) (fine between \$25 and \$500 for each violation).

ME. REV. STAT. ANN. tit. 10, § 1207 (1964) (fine up to \$500).

MASS. GEN. LAWS ANN. ch. 93, § 14F (West 1972) (fine up to \$500; imprisonment between one month and one year; or both).

MONTANA: same as in A.4.

N.D. CENT. CODE § 51-10-05 (Supp. 1977) (class A misdemeanor).

OKLA. STAT. ANN. tit. 15, § 598.4 (West 1966) (fine up to \$500).

PA. STAT. ANN. tit. 73, § 214 (Purdon 1971) (fine between \$50 and \$200; in default of payment, imprisonment for up to 30 days).

R.I. GEN. LAWS § 6-13-3 (1969) (fine up to \$500; imprisonment between one month and one year; or both).

S.C. CODE § 39-3-150 (1976) (fine between \$500 and \$5,000).

TENN. CODE ANN. § 69-110 (1976) (fine between \$10 and \$5,000 for manufacturers); *id.* § 69-305 (fine between \$5 and \$50 for first conviction for wholesalers and retailers; subsequent offenses, fine between \$50 and \$500).

TEX. BUS. & COM. CODE ANN. § 15.33(d) (Vernon 1968) (felony; imprisonment between two and ten years).

UTAH: same as in A.4.

VA. CODE § 59.1-15 (1973) (misdemeanor).

WASHINGTON: same as in A.4.

W. VA. CODE § 47-11A-11 (1976) (fine between \$100 and \$1,000; imprisonment up to 90 days; or both).

WIS. STAT. ANN. § 100.30(4) (West 1973) (fine between \$50 and \$500 for first offense; fine between \$200 and \$1,000 for subsequent offenses; between one and six months imprisonment).

WYO. STAT. § 40-4-115 (1977) (fine between \$100 and \$1,000; up to six months imprisonment; or both).

### *b. Civil Remedies*

Violations may also result in civil liability. Set forth below are the statutes providing for private civil relief.

ARIZ. REV. STAT. ANN. § 44-1465 (West 1967) (injunction).

ARK. STAT. ANN. § 70-310 (1957) (injunction, treble damages).

CALIFORNIA: same as in A.4.

COLORADO: same as in A.4.

HAWAII: same as in A.4.

IDAHO CODE § 48-406 (1977) (injunction, damages).

KENTUCKY: same as in A.4.

LA. REV. STAT. ANN. § 51:424 (West 1965) (injunction, attorney's fees).

ME. REV. STAT. ANN. tit. 10, § 1205 (1964) (injunction, treble damages, attorney's fees).

MD. COM. LAW CODE ANN. § 11-405 (1975) (injunction).

MONTANA: same as in A.4.

N.D. CENT. CODE § 51-10-06 (1974) (injunction).

OKLA. STAT. ANN. tit. 15, § 598.5 (West 1966) (injunction, actual damages, costs).

PA. STAT. ANN. tit. 73, § 215 (Purdon 1971) (injunction).

TENN. CODE ANN. § 69-306 (1976) (injunction against wholesalers and retailers).

UTAH: same as in A.4.

VA. CODE § 59.1-16 (1973) (injunction, actual damages, costs).

WASHINGTON: same as in A.4.

W. VA. CODE § 47-11A-9 (1976) (injunction, treble damages).

WIS. STAT. ANN. § 100.30(5) (West 1973) (injunction, costs and attorney's fees).

WYO. STAT. § 40-4-114 (1977) (injunction, damages).

### *c. Ouster*

An additional penalty is afforded in some states with the provision for forfeiture of the right to do business upon a violation of the sales-below-cost statutes. Set forth below are the citations to the statutes that contain this remedy.

ARK. STAT. ANN. § 70-311 (1957) (ouster after third violation).



LA. REV. STAT. ANN. § 51:423 (West 1965) (revocation of permit to do business).

MONTANA: same as in A.4.

S.C. CODE §§ 39-3-160 to -170 (1976) (ouster).

W. VA. CODE § 47-11A-10 (1976) (ouster upon third violation).

### C. Sales of Services: General Prohibitions

State prohibitions against price discrimination and sales below cost usually apply solely to sales of commodities. In a number of states, however, the sale or rendition of services is expressly included within the prohibitions. The statutes with such provisions are set forth below.

ARK. STAT. ANN. § 70-301 (1957) (service or output of service trade within price discrimination law); *id.* § 70-303 (same within sales-below-cost law).

CAL. BUS. & PROF. CODE § 17024 (West 1964) (definition of "article or product" within price discrimination and sales-below-cost laws includes service or output of service trade).

COLO. REV. STAT. § 6-2-103 (1973) (service or output of service trade within price discrimination law); *id.* § 6-2-105 (same within sales-below-cost law).

FLA. STAT. ANN. § 540.01(2) (West 1972) (definition of "commodity" in price discrimination law includes service or output of service trade).

HAWAII REV. STAT. § 481-1 (1976) (service or output of service trade within price discrimination law); *id.* § 481-3 (same within sales-below-cost law).

IDAHO CODE § 48-202 (1977) (services within price discrimination law).

IOWA CODE ANN. § 551.1 (West 1950) ("commercial services" within locality price discrimination law).

KY. REV. STAT. § 365.020(1) (1970) (service or output of service trade within price discrimination law); *id.* § 365.030(1) (same within sales-below-cost law).

MD. COM. LAW CODE ANN. § 11-204(a) (1975) (services within price discrimination law).

MONT. REV. CODES ANN. § 51-502 (Cum. Supp. 1977) (definition of "article of commerce" in price discrimination and sales-below-cost laws includes service or output of service trade).

N.M. STAT. ANN. § 49-11-2(D) (1953) (definition of "commodity" in price discrimination law includes commercial services).

OKLA. STAT. ANN. tit. 79, § 85 (West 1976) (price discrimination by combinations rendering services to public prohibited).

OR. REV. STAT. § 646.040 (1977) (service or output of service trade within price discrimination law).

UTAH CODE ANN. § 13-5-12 (1953) (one who "performs work upon, renovates, alters or improves . . . personal property" within sales-below-cost law).

VA. CODE § 59.1-9.7 (Cum. Supp. 1978) (services within price discrimination law).

WASH. REV. CODE ANN. § 19.90.010 (1978) (definition of "article or produce" within price discrimination and sales-below-cost laws includes service or output of service trade).

WYO. STAT. § 40-4-110(b) (1977) (one who "performs work upon, renovates, alters or improves . . . personal property" within sales-below-cost law).

P.R. LAWS ANN. tit. 10, § 263 (Cum. Supp. 1975) (services within price discrimination law).

#### D. Indirect Pricing Practices

Indirect methods of achieving price discrimination or of effecting a sale below cost, such as granting a secret rebate, discount, commission, or allowance, are frequently prohibited by special provisions in the state statutes. Five basic categories of these special provisions can be discerned:

a. Provisions stating that the payment of a secret rebate or other indirect price discount is a practice included within the price discrimination proscriptions;

b. Provisions stating that the payment is a practice included within the sales-below-cost proscription;

c. Provisions simply making the payment a separate unlawful practice;

d. Provisions making the payment an unlawful practice when conditioned upon the agreement that the recipient not deal with the seller's competitors;

e. Provisions making the payment unlawful when unavailable to all purchasers on the same terms.

The prohibitions against indirect pricing practices are set forth below. Following each citation is an indication of the nature of the prohibition, with reference to the above list when applicable.

ALA. CODE § 8-11-4 (1975) (c for officers, agents, or servants of railroad, manufacturing, or mining corporations).

ALASKA STAT. § 45.50.030 (Cum. Supp. 1978) (d).

ARK. STAT. ANN. § 70-301 (1957) (a); *id.* § 70-307 (c).

CAL. BUS. & PROF. CODE § 17045 (West 1964) (c); *id.* § 17049 (a, b).

COLO. REV. STAT. § 6-2-103(3) (1973) (a); *id.* § 6-2-108 (c).

CONN. GEN. STAT. ANN. § 35-29 (West Cum. Supp. 1978) (d).

HAWAII REV. STAT. § 481-1 (1976) (a); *id.* § 481-7 (c).

IDAHO CODE § 48-202(c)-(d) (1977) (c except for services rendered; e).

KY. REV. STAT. § 365.020(1) (1970) (a); *id.* § 365.050 (e).

MD. COM. LAW CODE ANN. § 11-204(a)(4) (1975) (e).

MASSACHUSETTS: Act of July 17, 1978, ch. 459, § 6, 1978 Mass. Legis. Serv. 462 (West) (to be codified as MASS. GEN. LAWS ANN. ch. 93, § 6) (d).

MICH. COMP. LAWS ANN. § 445.701b (West Cum. Supp. 1978-1979) (prohibits discounts, rebates, allowances, and advertising service charges over and above those available to competitors).

MO. ANN. STAT. § 416.031(3) (Vernon Cum. Supp. 1978) (d).

MONT. REV. CODES ANN. § 51-507(3) (Cum. Supp. 1977) (a).

NEB. REV. STAT. § 59-1605 (Cum. Supp. 1976) (d).

N.M. STAT. ANN. § 49-11-5 (1953) (c except for services rendered); *id.* § 49-11-6 (e).

N.D. CENT. CODE § 51-10-04 (1974) (b).

OR. REV. STAT. § 646.010 (1977) (a); *id.* § 646.060 (c except for services rendered); *id.* §§ 646.070-.080 (e).

TEX. BUS. & COM. CODE ANN. § 15.33(b)(2) (Vernon 1968) (c with intent to injure competition).

UTAH CODE ANN. § 13-5-3(c) (1953) (d).

VA. CODE § 59.1-9.7(c) (Cum. Supp. 1978) (c except for services rendered); *id.* § 59.1-9.7(d) (e).

WASH. REV. CODE ANN. § 19.90.040 (1978) (b).

W. VA. CODE § 47-11A-3 (1976) (e).

WIS. STAT. ANN. § 133.185 (West 1974) (e).

WYO. STAT. § 40-4-106 (1977) (a); *id.* § 40-4-111 (e).

P.R. LAWS ANN. tit. 10, § 263(b)-(c) (Cum. Supp. 1975) (e).

## E. Particular Products: Specific Prohibitions

Most states have statutes prohibiting price discrimination and sales below cost that apply only to particular commodities. These statutes have been enacted despite the fact that the specific products are oftentimes subject to one of the general prohibitions. Set forth below are the statutory prohibitions against price discrimination and sales below cost affecting individual products.

### 1. ALCOHOLIC BEVERAGES

The following states have statutes that prohibit price discrimination or selling below cost in the sale of alcoholic beverages.

CAL. BUS. & PROF. CODE § 25503 (West Cum. Supp. 1978) (manufacturer prohibited from locality discrimination).

COLO. REV. STAT. § 12-46-112(2)(a) (1973) (unlawful to supply commodities at less than market price for purpose of influencing sale of particular fermented malt beverage).

CONN. GEN. STAT. ANN. § 30-63 (West Cum. Supp. 1978) (manufacturers, wholesalers prohibited from discriminating among purchasers); *id.* § 30-68b (retail sales not below cost).

DEL. CODE ANN. tit. 6, § 2906(a)-(b) (Cum. Supp. 1977) (manufacturers required to give all retailers same voluntary allowances and to rent equipment at uniform rates).

IDAHO CODE § 23-1029 (1977) (requiring beer wholesalers, brewers, and dealers to submit price list with uniform prices for same class of buyers in same trade area); *id.* § 23-1033(1) (Cum. Supp. 1978) (prohibiting rebates by beer wholesalers, brewers, and dealers).

KAN. STAT. ANN. § 41-1101 (1973), *as amended by* Act of Apr. 19, 1978, ch. 185, § 3, 1978 Kan. Sess. Laws 842 (prohibiting price discrimination).

KY. REV. STAT. §§ 244.500, .560 (1970) (prohibiting gifts, premiums, prizes, and rebates in sale of malt beverages).

ME. REV. STAT. ANN. tit. 28, § 305 (1974 & Cum. Supp. 1978-1979) (prohibiting rebates, refunds, or concessions in sale of liquor).

MD. ANN. CODE art. 2B, § 108 (1976) (prohibiting price discrimination).

MASS. GEN. LAWS ANN. ch. 138, § 23A (West 1974 & Cum. Supp. 1978) (providing for suspension of license upon violation of general sales-below-cost statute).

MO. ANN. STAT. § 311.332 (Vernon 1963) (prohibiting price discrimination by wholesalers).

NEB. REV. STAT. § 53-168.03 (1974) (prohibiting amendments to price schedule that create price discrimination between retailers).

N.J. STAT. ANN. §§ 33:1-89 to -90 (West 1940) (prohibiting price discrimination and rebates in sales to retailers).

N.Y. ALCO. BEV. CONT. LAW § 101-b(2) (McKinney 1970 & Cum. Supp. 1978) (prohibiting price discrimination); *id.* § 101-bb ("cost" defined as cost plus 12%; sales below cost prohibited).

OKLA. STAT. ANN. tit. 37, § 536 (West Cum. Supp. 1978) (prohibiting price discrimination and rebates).

OR. REV. STAT. §§ 471.465-.470 (1977) (prohibiting granting of rebates by wholesalers or acceptance of rebates by retailers).

PA. STAT. ANN. tit. 47, § 2-207 (Purdon 1969 & Cum. Supp. 1978) (liquor control board may not fix discriminatory prices).

S.D. CODIFIED LAWS ANN. § 35-4-52 (1977) (prohibiting valuable gifts or concessions to promote sales).

TEX. ALCO. BEV. CODE ANN. tit. 4, §§ 102.04, .07 (Vernon 1978) (prohibiting rebates and valuable concessions to induce sales).

VA. CODE § 4-118.15 (Cum. Supp. 1978) (prohibiting price discrimination by breweries among their wholesalers).

W. VA. CODE § 11-16-13a (1974) (prohibiting price discrimination in sale of nonintoxicating beer, ale, or other malt beverages).

## 2. CIGARETTES AND TOBACCO

The following state statutes prohibit price discrimination or sales below cost with regard to the sale of cigarettes or other tobacco products.

ARK. STAT. ANN. §§ 70-601 to -613 (1957) (prohibiting sales below cost).

CONN. GEN. STAT. ANN. §§ 12-322 to -329 (West 1972 & Cum. Supp. 1978) (prohibiting sales below cost).

DEL. CODE ANN. tit. 6, §§ 2601-2608 (Supp. 1977) (prohibiting sales below cost).

GA. CODE ANN. § 92-2204(h)-(i) (1974) (prohibiting sales below cost).

IND. CODE ANN. §§ 24-3-3-1 to -13 (Burns 1974 & Cum. Supp. 1978) (prohibiting sales below cost).

IOWA CODE ANN. §§ 551A.1-.11 (West 1950 & Cum. Supp. 1978) (prohibiting sales below cost).

KY. REV. STAT. §§ 248.350-.360 (1970), *as amended by* Act of Mar. 30, 1978, ch. 270, §§ 2, 5-6, 9, 1978 Ky. Acts 789 (prohibiting price discrimination by warehouses or warehousemen); KY. REV. STAT. §§ 365.260-.380 (1970) (prohibiting sales below cost by wholesalers or retailers).

ME. REV. STAT. ANN. tit. 10, §§ 1201-1207 (1964 & Cum. Supp. 1978-1979) (prohibiting sales below cost).

MD. COM. LAW CODE ANN. §§ 11-501 to -510 (1975 & Cum. Supp. 1978) (prohibiting sales and purchases below cost).

MASS. GEN. LAWS ANN. ch. 64C, §§ 12-21 (West 1969) (prohibiting sales below cost).

MISS. CODE ANN. §§ 75-23-1 to -27 (1972) (prohibiting sales below cost).

MONT. REV. CODES ANN. §§ 51-301 to -314 (Cum. Supp. 1977) (prohibiting sales below cost and rebates).

NEB. REV. STAT. §§ 59-1501 to -1518 (1974 & Cum. Supp. 1978) (prohibiting sales below cost and rebates).

N.J. STAT. ANN. §§ 56:7-18 to -38 (West 1964 & Cum. Supp. 1978) (prohibiting sales below cost and rebates).

N.M. STAT. ANN. §§ 49-3-1 to -13 (1966 & Supp. 1975), *as amended by* Act of Apr. 7, 1977, ch. 249, §§ 31-32, 1977 N.M. Laws 1457 (prohibiting sales below cost).

OHIO REV. CODE ANN. §§ 1333.11-.211 (Page 1962 & Supp. 1977) (prohibiting sales below cost).

OKLA. STAT. ANN. tit. 15, §§ 599.1-.18 (West 1966) (prohibiting sales below cost).

PA. STAT. ANN. tit. 73, §§ 231.1-.15 (Purdon 1971) (prohibiting sales below cost).

TENN. CODE ANN. §§ 69-401 to -413 (1976) (prohibiting sales below cost).

WASH. REV. CODE ANN. §§ 19.91.010-.110 (1978) (prohibiting sales below cost and rebates).

### 3. FARM AND DAIRY PRODUCTS

Statutes that prohibit price discrimination or sales below cost in the sale or purchase of farm or dairy products may be found in the following states.

ARIZ. REV. STAT. ANN. § 3-631 (West 1964) (prohibiting locality discrimination in sale of milk, cream, or butterfat).

ARK. STAT. ANN. §§ 70-123 to -125 (1957) (prohibiting locality discrimination in sale of certain dairy products); *id.* §§ 70-701 to -707 (prohibiting sale of milk at less than cost plus 4%).

CAL. AGRIC. CODE § 61384 (West 1968) (prohibiting sales below cost of milk, cream, or any dairy product).

CONN. GEN. STAT. ANN. §§ 22-243, -245(2), (4) (West 1975) (granting Commissioner of Agriculture power to prohibit and issue a cease-and-desist order against price discrimination, sales below cost, and rebates in sale of milk and milk products).

IDAHO CODE §§ 22-1601 to -1606 (1977) (prohibiting price discrimination in the sale of farm products); *id.* §§ 37-1001 to -1015 (prohibiting locality discrimination in buying by manufacturers of milk, cream, or butterfat; prohibiting locality discrimination, rebates, and sales below cost of milk, cream, or any dairy product).

IND. CODE ANN. §§ 24-4-1-1 to -6 (Burns 1974 & Cum. Supp. 1978) (prohibiting locality price discrimination in sale of milk or milk products).

IOWA CODE ANN. §§ 192A.1-.4, .6 (West 1969) (prohibiting locality price discrimination and rebates in sale of any dairy product).

KY. REV. STAT. § 260.705 (1970) (prohibiting locality price discrimination, sales below cost, and rebates in sale of milk, cottage cheese, or frozen dairy products).

MASS. GEN. LAWS ANN. ch. 94A, § 14(d)-(e) (West 1972) (prohibiting sales below cost, price discrimination, and rebates in sale of milk).

MICH. COMP. LAWS ANN. § 750.553 (West 1968) (prohibiting locality price discrimination in the purchase of poultry, eggs, milk, cream, or butterfat); *id.* § 750.554 (prohibiting locality price discrimination in the purchase of potatoes, grain, or beans).

MISS. CODE ANN. § 75-31-59 (1972) (prohibiting locality price discrimination in purchase and sale of any dairy product); *id.* §§ 75-31-301 to -313 (prohibiting locality discrimination, sales below cost, and rebates in sale of milk products).

MO. ANN. STAT. §§ 416.410-.485 (Vernon Cum. Supp. 1978) (prohibiting locality price discrimination, sales below cost, and rebates in sale of any milk product).

NEV. REV. STAT. §§ 584.570, .583 (1977) (prohibiting sales below cost and rebates in sale of fluid milk, fluid cream, butter, or "fresh dairy byproducts").

N.Y. AGRIC. & MKTS. LAW §§ 258-s to -z (McKinney Cum. Supp. 1978) (prohibiting sales below cost, price discrimination, and rebates in sale of fluid milk and fluid milk products).

N.C. GEN. STAT. § 106-266.19 (1978) (prohibiting sale of milk below cost).

N.D. CENT. CODE § 4-14-04 (1975) (prohibiting locality price discrimination in sale of farm products).

OHIO REV. CODE ANN. § 1331.15 (Page 1962) (prohibiting locality price discrimination in sale of milk, cream, or butterfat).

OKLA. STAT. ANN. tit. 2, § 419.3(i)-(l) (West 1973) (prohibiting locality price discrimination within a given county, rebates, and sales below cost by wholesalers, producers, and distributors of dairy products).

OR. REV. STAT. § 583.600 (1977) (prohibiting sale of fluid milk below cost).

R.I. GEN. LAWS § 6-13-2.1 (1970) (prohibiting sale of milk or any services connected with sale of milk below cost, and rebates which bring price below cost).

S.C. CODE §§ 39-33-1010 to -1060 (1976) (prohibiting price discrimination, rebates, and sales below cost in sale of milk).

S.D. CODIFIED LAWS ANN. §§ 37-3-11 to -14, -17 to -20, -29 to -30 (1977) (prohibiting sales below cost, rebates, price discrimination, locality price discrimination, in the sale of, and acceptance of such benefits in the purchase of, dairy products); *id.* §§ 38-14-1 to -3 (prohibiting locality price discrimination in sale of grain or flaxseed).

TENN. CODE ANN. § 52-332(1)(a), (c)-(f), (2)(a), (c)-(d), (3)-(4) (1977) (prohibiting sales below cost, locality price discrimination, and rebates in sale of, and acceptance of such benefits in purchase of, any milk product).

UTAH CODE ANN. § 5-4-6 (1971) (prohibiting price discrimination between different producers of agricultural commodities).

VT. STAT. ANN. tit. 6, § 2751 (1972) (prohibiting locality price discrimination in purchase of dairy products).

WIS. STAT. ANN. § 100.201(2) (West 1973) (prohibiting rebates, price discrimination, and sales below cost in sale of "selected dairy products"); *id.* § 100.22 (prohibiting locality price discrimination in purchase of milk, cream, or butterfat).

#### 4. INSURANCE

The following states have statutes that prohibit unreasonable rate discrimination or indirect pricing practices in the selling of some or all types of insurance.

ALA. CODE §§ 27-12-11 to -14 (1975).

ALASKA STAT. §§ 21.36.090-.110 (1966 & Cum. Supp. 1978).

ARIZ. REV. STAT. ANN. §§ 20-448 to -451, -1061 (West 1975).

ARK. STAT. ANN. § 66-3005(7)-(8) (Cum. Supp. 1977).

CAL. INS. CODE § 790.03(f) (West Cum. Supp. 1978).

COLO. REV. STAT. § 10-3-1104(1)(f)-(g) (1973 & Cum. Supp. 1976), *as amended by* Act of Mar. 21, 1978, ch. 52, 1978 Colo. Sess. Laws 295.

CONN. GEN. STAT. ANN. §§ 38-59, -149, -172 (West 1969).

DEL. CODE ANN. tit. 18, § 2304(13)-(15) (1974 & Cum. Supp. 1977).

FLA. STAT. ANN. § 626.9541(7)-(8) (West Cum. Supp. 1978).

GA. CODE ANN. § 56-704(7)-(8) (1977 & Cum. Supp. 1978).

HAWAII REV. STAT. § 431-643(7)-(8) (1976).

IDAHO CODE §§ 41-1313 to -1315, -1405 (1977).

ILL. ANN. STAT. ch. 73, §§ 763-764 (Smith-Hurd 1965 & Cum. Supp. 1978); *id.* § 848, *as amended by* Pub. Act No. 80-1373, 1978 Ill. Legis. Serv. 905 (West); ILL. ANN. STAT. ch. 73, §§ 849, 976 (Smith-Hurd 1965 & Cum. Supp. 1978).

IND. CODE ANN. § 27-1-20-30 (Burns Cum. Supp. 1978); *id.* § 27-4-1-4(7)-(8) (Burns 1975).

IOWA CODE ANN. § 507B.4(7)-(8) (West Cum. Supp. 1978).

KAN. STAT. ANN. § 40-2404(7)-(8) (1973).

KY. REV. STAT. §§ 304.12-080 to -110, .13-030(b), .17-390(3), .22-020(2), .29-540(1) (1970 & Cum. Supp. 1976).

LA. REV. STAT. ANN. § 22:1214(7)-(8) (West 1978).

ME. REV. STAT. ANN. tit. 24-A, §§ 2159, 2160-2163 (1974).

MASS. GEN. LAWS ANN. ch. 176D, § 3(7)-(8) (West Cum. Supp. 1978), *as amended by* Act of July 15, 1978, ch. 446, § 6, 1978 Mass. Sess. Law Serv. 448 (West).

MICH. COMP. LAWS ANN. §§ 500.2017, .2019-.2020, .2024-.2025 (West 1967).

MISS. CODE ANN. § 83-5-35(g) (1972).

MO. ANN. STAT. §§ 379.318(4), .356 (Vernon Cum. Supp. 1978); Act of June 8, 1978, H.B. No. 1447, § 1, 1978 Mo. Legis. Serv. 196 (Vernon) (to be codified as MO. ANN. STAT. § 375.936(7)-(8)).

MONT. REV. CODES ANN. §§ 40-3509 to -3512 (1961 & Cum. Supp. 1977).

NEB. REV. STAT. § 44-1525(7)-(8) (1974 & Cum. Supp. 1978).

NEV. REV. STAT. §§ 686A.100-.140 (1971).

N.H. REV. STAT. ANN. § 417:4(VIII)-(IX) (Supp. 1977).

N.J. STAT. ANN. §§ 17B:30-12(c)-(d), -13 (West Cum. Supp. 1978).

N.M. STAT. ANN. § 58-9-25(G)-(H) (Supp. 1975).

N.Y. INS. LAW §§ 183(c), 188, 209 (McKinney 1966 & Cum. Supp. 1978).

N.C. GEN. STAT. § 58-54.4(7)-(8) (1975 & Cum. Supp. 1977).

N.D. CENT. CODE § 26-30-04(7)-(8) (1978).

OHIO REV. CODE ANN. §§ 3911.18-.19 (Page 1971).

OKLA. STAT. ANN. tit. 36, § 1204(7)-(8), (10) (West 1976).

OR. REV. STAT. §§ 737.310, 746.015, .018, .025, .035, .045, .055, .160 (1977).

PA. STAT. ANN. tit. 40, § 1171.5(7)-(8) (Purdon Cum. Supp. 1978).

R.I. GEN. LAWS §§ 27-4-1, -6 (1968 & Cum. Supp. 1977).

S.C. CODE §§ 38-55-120 to -130(3) (1976).

S.D. CODIFIED LAWS ANN. §§ 58-33-12 to -14, -24 to -26 (1978).

TENN. CODE ANN. §§ 56-1204(7)-(8), -1214 (1968 & Cum. Supp. 1978).

TEX. REV. CIV. STAT. ANN. art. 5.09 (Vernon 1963); *id.* art. 21.21, §



4(7)-(8) (Vernon 1963 & Supp. 1978).

UTAH CODE ANN. § 31-27-14 (1974).

VT. STAT. ANN. tit. 8, § 4724 (1958 & Cum. Supp. 1978).

VA. CODE § 38.1-53(7)-(8) (1976 & Cum. Supp. 1978).

WASH. REV. CODE ANN. §§ 48.30.140-.150, .170 (1961 & Supp. 1978).

W. VA. CODE § 33-11-4(7)-(8) (1975).

WIS. STAT. ANN. §§ 625.11, 628.34(2)-(3) (West 1978).

WYO. STAT. §§ 26-13-109 to -112 (1977).

D.C. CODE ENCYCL. § 35-1333 (West 1968).

## 5. PETROLEUM PRODUCTS

The state statutes listed in this section prohibit price discrimination or sales below cost in the sale or purchase of petroleum or petroleum products.

ALASKA STAT. § 42.06.380 (1976) (pipeline carriers; prohibiting locality price discrimination and rebates).

ARK. STAT. ANN. §§ 53-521 to -524 (Cum. Supp. 1977) (prohibiting locality discrimination in purchase of crude oil).

CAL. BUS. & PROF. CODE §§ 21200-21203 (West Cum. Supp. 1978) (prohibiting locality discrimination in sale of motor fuel by refiners, manufacturers, distributors, or transporters).

DEL. CODE ANN. tit. 6, § 2906(a)-(b) (Cum. Supp. 1977) (manufacturers of motor fuel required to be uniform in granting voluntary allowances and in renting equipment).

MASS. GEN. LAWS ANN. ch. 94, § 295P (West 1972) (motor fuels; prohibiting sales below cost by retail dealers).

MICH. COMP. LAWS ANN. §§ 445.171-.184 (West 1967) (prohibiting locality price discrimination, sales below cost, and inducements in sale of petroleum products by manufacturers, producers, or distributors); *id.* § 750.555 (West 1968) (prohibiting locality price discrimination in sale of petroleum products by producers, manufacturers, or distributors).

MONT. REV. CODES ANN. §§ 60-401 to -407 (1970) (prohibiting locality price discrimination in sale of "standard petroleum products").

NEV. REV. STAT. §§ 708.090-.140 (1973) (prohibiting price discrimination by common carriers of crude oil or petroleum, including pipeline carriers).

N.J. STAT. ANN. § 56:6-2(b), (e) (West 1964) (prohibiting sales below cost and rebates in retail sale of motor fuel).

OKLA. STAT. ANN. tit. 52, §§ 23, 240 (West 1969) (common purchasers of natural gas; prohibiting price discrimination); *id.* § 54 (common purchasers of petroleum; prohibiting price discrimination).

OR. REV. STAT. § 646.880(2) (1977) (prohibiting price discrimination in retail sale of diesel fuel).

S.D. CODIFIED LAWS ANN. §§ 37-2-1 to -4 (1977) (prohibiting locality price discrimination in sale of gasoline, kerosene, or liquified petroleum gas).

TENN. CODE ANN. § 69-723 (Cum. Supp. 1978) (prohibiting price discrimination in sale of petroleum products by refiners, distributors, or producers).

WYO. STAT. § 40-4-117 (1977) (prohibiting locality price discrimination in sale of petroleum and petroleum products).

## 6. MISCELLANEOUS PRODUCTS

The following state statutes prohibiting price discrimination and sales below cost deal with miscellaneous products that do not fit into the other five categories.

ARIZ. REV. STAT. ANN. § 36-1901(7)(r) (West 1974) (hearing aids; prohibits sharing profits with doctors as an inducement to influence others to purchase from the seller or refrain from dealing with seller's competitors).

ARK. STAT. ANN. §§ 70-126 to -129 (1957) (news service; prohibiting locality price discrimination).

COLO. REV. STAT. § 40-11-105(2) (1973) (contract motor carriers; prohibiting price discrimination).

CONN. GEN. STAT. ANN. § 19-242 (West 1977) (drugs; prohibiting sale by retailers at less than wholesale price).

FLA. STAT. ANN. § 364.09 (West 1968) (prohibiting rebates on telephone or telegraph service) (repealed by sunset law in 1980).

HAWAII REV. STAT. § 269-16(a) (1976) (public utilities; commissioner may prohibit rates that discriminate between localities or users).

IDAHO CODE § 61-310 (1976) (common carriers; prohibiting price preferences and rebates); *id.* § 61-315 (public utilities; prohibiting locality price discrimination and price preferences).

ILL. ANN. STAT. ch. 111 2/3, §§ 38-39 (Smith-Hurd 1966 & Cum. Supp. 1978) (public utilities, common carriers; prohibiting locality price discrimination, rebates, and discrimination on basis of customer's use of solar power).

KAN. STAT. ANN. § 50-201 (1976) (news service; prohibiting price discrimination); *id.* § 66-107 (1972) (common carriers and public utilities; prohibiting price discrimination); *id.* §§ 66-154 to -154a (railroad companies and common carriers; prohibiting rebates and price discrimination); *id.* §§ 66-1, -112e (contract motor carriers in competition with other common carriers; prohibiting price discrimination).

KY. REV. STAT. § 365.210 (1970) (foreign news service corporations; prohibiting price discrimination); *id.* § 365.230 (telephone, telegraph, and other news-gathering companies; prohibiting price discrimination).

LA. REV. STAT. ANN. § 522, para. 2 (West 1965) (drug retailers; prohibiting rebates and sales below cost).

ME. REV. STAT. ANN. tit. 35, §§ 102-103 (1978) (public utilities; prohibiting price discrimination, rebates); *id.* § 1554 (commercial motor carriers; prohibiting rebates).

MD. ANN. CODE art. 78, § 26 (1975 & Cum. Supp. 1978) (public service companies; prohibiting locality price discrimination, including rebates and special rates).

MASS. GEN. LAWS ANN. ch. 159B, § 19 (West 1970) (commercial motor carriers; prohibiting price discrimination); *id.* ch. 160, § 211 (West 1976) (railroads; prohibiting price discrimination).

MICH. COMP. LAWS ANN. §§ 445.171-.184 (West 1967) (bakery products; prohibiting locality price discrimination, sales below cost, and inducements by producers, manufacturers, or distributors).

MONT. REV. CODES ANN. § 8-703 (1968) (common carriers; prohibiting price preferences); *id.* § 70-114 (1971) (public utilities; prohibiting rebates that effectively change rates charged).

NEB. REV. STAT. § 59-1405 (1974) (musical compositions; prohibiting price discrimination).

NEV. REV. STAT. § 706.766 (1975) (common or contract motor carriers; prohibiting rebates that effectively change rates charged).

N.M. STAT. ANN. § 68-6-6 (1974) (public utilities; prohibiting locality price discrimination); *id.* § 69-3-16 (railroads; prohibiting locality price discrimination).

OHIO REV. CODE ANN. § 4905.33 (Page 1977) (public utilities; prohibiting price discrimination, rebates, and sales below cost); *id.* §§ 4907.35-.38 (railroads; prohibiting price discrimination, concessions, preferences, and rebates).

OR. REV. STAT. § 625.320 (1977) (bakery products; prohibiting any form of valuable concession in connection with sale); *id.* §§ 57.310-.330 (public utilities; prohibiting price discrimination, rebates, and acceptance of such benefits); *id.* §§ 760.170-.180 (railroads; prohibiting locality price discrimination, rebates, and acceptance of such benefits); *id.* § 767.410 (common carriers; prohibiting price discrimination and rebates).

PA. STAT. ANN. tit. 66, § 1144 (Purdon 1959) (public utilities; prohibiting locality price discrimination).

R.I. GEN. LAWS § 6-13.1-13 (Cum. Supp. 1977) (electric and gas appliance manufacturers and parts distributors; prohibiting price discrimination).

S.C. CODE §§ 58-17-1960 to -2000 (1976) (railroads; prohibiting price discrimination, locality price discrimination, and rebates); *id.* § 58-17-2790 (railroads; prohibiting price discrimination against connecting railroads).

TENN. CODE ANN. §§ 69-113 to -115 (1976) (news services; prohibiting price discrimination).

TEX. BUS. & COM. CODE ANN. tit. 2, § 15.05(b) (Vernon 1968) (public utilities; prohibiting locality price discrimination); TEX. REV. CIV. STAT. ANN. art. 6559i-4 (Vernon Cum. Supp. 1978) (railroads; prohibiting price discrimination).

UTAH CODE ANN. § 50-2-4 (1970) (news services; prohibiting price discrimination); *id.* §§ 54-4-4, -7-20 (1974 & Supp. 1977) (public utilities; authorizing commission to correct prices determined to be discriminatory and order reparation to complainant).

WIS. STAT. ANN. § 100-31 (West Cum. Supp. 1978) (drugs; prohibiting price discrimination); *id.* §§ 194.19, .34 (West 1957 & Cum. Supp. 1978) (common motor carriers; prohibiting price discrimination); *id.* § 195.11 (West 1957) (railroads; prohibiting price discrimination).

WYO. STAT. § 37-8-108 (1977) (competing contract motor carriers; prohibiting price discrimination); *id.* § 40-13-104 (music licenses; prohibiting price discrimination by "music licensing agencies").

D.C. CODE ENCYCL. § 43-201a (West Cum. Supp. 1978) (public utilities; prohibiting price discrimination).

